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## **Erasing Gender Privilege in Nonconsensual Procreation: An Argument for an Equitable Change to the Law Regarding the Unauthorized Use of Sperm**

*“[W]hen it comes to procreative freedom, ‘choice’ is an essential ingredient, and as one feminist legal scholar deftly put it, ‘more is better than less.’”*<sup>1</sup>

### I. INTRODUCTION

In 2002, Layne Hardin froze his sperm with his then-girlfriend for possible future use in the event the couple would want more children.<sup>2</sup> The two eventually broke up, and Hardin started dating another woman, Toby Devall.<sup>3</sup> Eventually, Hardin ended his relationship with Devall, but his dealings with her did not end then.<sup>4</sup> In the years following the split, Hardin became aware that he had a child with Devall from a child support suit.<sup>5</sup> Hardin eventually discovered Devall had gone—without his knowledge—to the fertility clinic where Hardin had stored his sperm, posed as his wife, received two frozen vials of his sperm in a brown paper bag, and went to a nearby fertility clinic to be inseminated with it.<sup>6</sup> He filed a suit against Devall and the fertility clinic, which is currently pending in a Houston state court.<sup>7</sup>

Roughly a year before Hardin initiated his suit, another man, Joe Pressil, began his own legal battle against an ex-girlfriend in the same Houston court.<sup>8</sup> Pressil alleges his ex-girlfriend took his sperm from a used condom, brought it to a fertility clinic, and was inseminated.<sup>9</sup> When she became pregnant, Pressil

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1. Michael J. Higdon, *Fatherhood by Conscriptio: Nonconsensual Insemination and the Duty of Child Support*, 46 GA. L. REV. 407, 457 (2012) (acknowledging need to provide men choice in procreation when did not consent to conception).

2. See *Obstetrical and Gynecological Assocs. v. Hardin*, No. 01-03-00236-CV, 2013 WL 6047595, at \*1 (Tex. Ct. App. Nov. 14, 2013) (affirming trial court’s decision denying clinic’s motion to dismiss suit); Russell Goldman, *Louisiana Man Accuses Ex-Girlfriend of Stealing His Sperm*, ABC NEWS (Mar. 1, 2013), <http://abcnews.go.com/US/man-accuses-girlfriend-stealing-sperm/story?id=18631048> (telling story of Layne Hardin).

3. See Goldman, *supra* note 2 (introducing Devall).

4. See *id.* (explaining Devall and Hardin’s relationship).

5. See *id.* (discussing child support suit initiated by Devall).

6. See *id.* (chronicling Devall’s acquisition of Hardin’s sperm).

7. See Goldman, *supra* note 2 (describing nature of Hardin’s suit).

8. See Christina Caron, *Surprise Twins: Man Sues Fertility Clinic*, ABC NEWS (Nov. 24, 2011), <http://abcnews.go.com/Health/surprise-twins-man-sues-fertility-clinic/story?id=15015147> (telling story of Joe Pressil).

9. See *id.* (describing Pressil’s allegations).

assumed it was an accident, but after four years of paying child support, he discovered a fertility receipt with his name on it as a donor.<sup>10</sup> He claimed he never donated sperm and realized what had happened.<sup>11</sup> He sued the fertility clinic, a suit which was dismissed on the clinic's motion; his ex-girlfriend for sole custody of their twin sons; and currently has a malpractice suit pending against his attorney in the matter.<sup>12</sup>

Both men fell victim to an outlandish scenario: sperm stealing.<sup>13</sup> Sperm stealing—also known as the unauthorized use of sperm—comes in several forms, which fall in three categories: sperm stashing, nonconsensual sexual intercourse, and the improper use of artificial reproductive technology (ART).<sup>14</sup> Sperm stashing usually occurs through a woman saving sperm from oral sexual relations or a used condom and using such sperm to inseminate herself.<sup>15</sup> Sperm stealing through nonconsensual sexual intercourse includes rape and statutory rape that results in pregnancy.<sup>16</sup> Improper use of ART includes a woman obtaining and becoming inseminated with a man's sperm donation or implanted with fertilized pre-embryos created with his sperm without his consent.<sup>17</sup> A handful of cases dealing with sperm stealing have made it on to court dockets.<sup>18</sup> Most have been dismissed, others given the chance to make it to trial, and a clear minority have resulted in favorable verdicts for the man whose sperm was stolen.<sup>19</sup> Cases that have achieved verdicts, however, are

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10. See *id.* (explaining discovery of sperm stashing).

11. See *id.*

12. See Plaintiff's Original Petition and Request for Disclosure at 2-3, *Pressil v. Gibson*, No. 201351350 (Tex. Dist. Ct. Aug. 30, 2013) (filing legal malpractice suit against attorney representing him in fertility matter); see also *Pressil v. Advanced Fertility Ctr. of Tex.*, 2011-0457 (Tex. Dist. Ct. July 12, 2012) (dismissing *Pressil's* action against fertility clinic); Caron, *supra* note 8 (discussing litigation of *Pressil's* case).

13. See Higdon, *supra* note 1, at 426-31 (outlining sperm stealing).

14. See *id.* at 409-13 (highlighting several sperm stealing strategies).

15. See *Phillips v. Irons*, No. 05 L 4910, 2006 WL 4472185 (Ill. Cir. Ct. Apr. 18, 2006) (detailing allegations of defendant saving sperm after oral sex for insemination); Caron, *supra* note 8 (describing sperm stolen from condom for insemination).

16. See generally *S.F. v. State ex rel. T.M.*, 695 So. 2d 1186 (Ala. Civ. App. 1996) (discussing nonstatutory rape resulting in pregnancy); *Cnty. of San Luis Obispo v. Nathaniel J.*, 57 Cal. Rptr. 2d 843 (Ct. App. 1996) (addressing statutory rape resulting in pregnancy).

17. See *Gladu vs. Boston IVF, Inc., et al.*, 22 NAT. J.V.R.A. 5:28 (last visited Feb. 16, 2015) (awarding *Gladu* damages for implantation of pre-embryo created with his sperm in estranged wife); see also CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 323-24 (2d ed. 2011) (discussing *Gladu*).

18. See, e.g., *S.F.*, 695 So. 2d at 1186-88 (explaining case of rape leading to pregnancy); *Nathaniel J.*, 57 Cal. Rptr. 2d at 843-44 (describing case of statutory rape leading to pregnancy); *Phillips*, 2006 WL 4472185, at \*1 (detailing allegations defendant saved sperm after oral sex for insemination); *Gladu vs. Boston IVF, Inc., et al.*, *supra* note 17, at 5:28 (awarding *Gladu* damages for stolen pre-embryo created with his sperm).

19. See, e.g., *S.F.*, 695 So. 2d at 1189 (holding male rape victim liable for child support); *Nathaniel J.*, 57 Cal. Rptr. 2d 843, 845-46 (holding statutory rape victim liable for support); *Phillips*, 2006 WL 4472185, at \*1 (dismissing all but one cause of action); *Gladu vs. Boston IVF, Inc., et al.*, *supra* note 17, at 5:28 (awarding *Gladu* damages of \$108,000 for stolen pre-embryo created with his sperm); see also KINDREGAN & MCBRIEN, *supra* note 17, at 323-24 (acknowledging man awarded damages for stolen sperm).

restricted to improper use of ART, creating a class system among the categories of sperm stealing.<sup>20</sup> Typically, courts favor the policy of child welfare, ensuring the child has the support of two parents and making male rights to reproductive choice insignificant.<sup>21</sup> In Massachusetts—a state that allowed recovery for a man whose fertilized pre-embryo was used by his estranged wife—a new set of child support guidelines took effect on August 1, 2013, greatly enforcing and emphasizing the policy to favor the welfare of the child at all costs.<sup>22</sup> It prompts the inquiry of whether these policies may affect this preexisting case law.<sup>23</sup>

This Note will explore these different avenues of sperm stealing and the consequences of such actions. Part II.A will discuss the general history and development of child support guidelines.<sup>24</sup> Part II.B will discuss the current arguments calling for more attention to a man's right to not procreate and the historical trend solely favoring the woman's choice regarding procreation.<sup>25</sup> Part II.C will discuss the unauthorized use of sperm through statutory rape, nonstatutory rape, and sperm stashing.<sup>26</sup> Part II.D will discuss the unauthorized use of sperm specifically in relation to insemination or implantation procedures without the man's consent to use his sperm.<sup>27</sup> Part III will then argue for equal treatment in the realm of the unauthorized use of sperm between sperm stealing and the improper use of ART.<sup>28</sup>

## II. HISTORY

### A. An Overview of Child Support Obligations

Child support is an obligation of all biological and adoptive parents.<sup>29</sup> These obligations—by law—persist until the child reaches the age of majority or legal parentage is terminated by emancipation or adoption.<sup>30</sup> Although each

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20. See Higdon, *supra* note 1, at 457 (criticizing unequal treatment between ART and nonART sperm stashing victims); Pam Belluck, *The Right To Be a Father (or Not)*, N.Y. TIMES (Nov. 6, 2005), <http://nytimes.com/2005/11/06/weekinreview/06belluck.html> (noting divergence in law of procreation and ART).

21. See Belluck, *supra* note 20 (noting lack of male reproductive choice).

22. See ROBERT A. MULLIGAN, OFFICE OF THE CHIEF JUSTICE, THE COMMONWEALTH OF MASS., CHILD SUPPORT GUIDELINES (2013), available at <http://www.mass.gov/dor/docs/cse/guidelines/2013-child-support-guidelines.pdf>, archived at <https://perma.cc/3STM-X87C?type=pdf> (outlining new child support guidelines effective August 1, 2013).

23. See *id.*

24. See *infra* Part II.A (discussing child support generally).

25. See *infra* Part II.B (discussing man's right to procreate).

26. See *infra* Part II.C (describing women who steal sperm through sperm stashing and nonconsensual sexual intercourse for pregnancy).

27. See *infra* Part II.D (describing women who steal sperm through ART for pregnancy).

28. See *infra* Part III (calling for equal treatment of unauthorized use of sperm situations).

29. See ROBERT L. MADDEX, ENCYCLOPEDIA OF SEXUAL BEHAVIOR AND THE LAW 65 (2006) (describing child support obligations).

30. See *id.* (stating age of majority for child support purposes eighteen or twenty-one depending on

jurisdiction has its own guidelines and polices for determining child support obligations, generally, each parent's obligation depends upon the income of that parent coupled with the percentage of time the child spends with that parent.<sup>31</sup> These obligations can be modified under certain circumstances.<sup>32</sup> Failure to pay child support has penalties, including fines and imprisonment.<sup>33</sup>

The driving policy for anything involving children in a court of law is to do what is in the best interest of the child, and that policy has an overwhelming presence in child support determination.<sup>34</sup> A related policy in child support jurisprudence is for the government to place the financial responsibility of the child upon a parent rather than taxpayers in the form of welfare benefits.<sup>35</sup> Together, these policies hope to deter irresponsible procreative behavior.<sup>36</sup> The fiscal policy of the government and the child-centric policy of the judiciary work together to prevent the harsh reality that "children of single parents have a greater probability of poverty, academic failure, and social problems."<sup>37</sup> These policies are so strong that the federal government has involved itself in regulating child support payments through the Social Security Act.<sup>38</sup> Overall,

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jurisdiction); *see also* Myrisha S. Lewis, *Making Sex the Same: Ending the Unfair Treatment of Males in Family Law*, 27 WIS. J.L. GENDER & SOC'Y 257, 263 (2012) (defining child support). Such obligations could continue past the age of majority in certain circumstances, such as if the child is in college or has special needs. *See* MADDEX, *supra* note 29, at 65 (explaining nuances of child support laws).

31. *See* MADDEX, *supra* note 29, at 65 (describing determination of child support obligations); *see also* Adrienne D. Gross, Note, *A Man's Right To Choose: Searching for Remedies in the Face of Unplanned Fatherhood*, 55 DRAKE L. REV. 1015, 1031 (2007) (describing how states determine support). The amount the child is afforded is often more than he or she actually needs because courts formulate an amount that provides the child with a comparable lifestyle to the parent. *See* Gross, *supra*, at 1032 ("[F]ather should . . . give more support . . . to provide the child with a standard of living comparable to his.").

32. *See* MADDEX, *supra* note 29, at 65 (stating decrease or increase in parent's income can warrant modification).

33. *See id.* at 66 (outlining consequences for not paying child support); *see also* Higdon, *supra* note 1, at 417 (stating courts may withhold owed child support from obligor's paycheck or revoke passports). Although family law is generally determined at the state level, the failure of some parents to pay child support in the 1980s and 1990s prompted federal action in securing such payments. *See* MADDEX, *supra* note 29, at 66 (describing child support regulations). These federal laws require a state to enforce child support obligations from sister states, maintain federally approved child support guidelines, and allow the federal government to bring criminal charges against delinquent obligors who live in different states from their children. *See id.* The federal government allows states to take into consideration the following factors in developing their child support guidelines: "needs of the child, such as health care, education, day care, and special needs; income and needs of each parent; number of children being supported; and the child's standard of living before the family's dissolution." *Id.*

34. *See* MADDEX, *supra* note 29, at 66 (explaining, in some cases, this means separation or divorce of child's parents); *see also* MULLIGAN, *supra* note 22, at 2 (requiring parents maintain same standard of living as marriage for child).

35. *See* Higdon, *supra* note 1, at 415-16 (stating child support debt totals \$105 billion, half claimed by government to recoup welfare benefits).

36. *See id.* at 413 (introducing history of child support).

37. MADDEX, *supra* note 29, at 66 (discussing role of child support).

38. *See* Higdon, *supra* note 1, at 414-15 (describing system created by federal government and states to ensure payment of child support). The Social Security Act requires a biological mother to make good faith efforts to secure child support payments in order to receive welfare benefits, and under the Temporary

child support is considered “a means by which the law ensures that a child whose parents do not live together receives at least the basic necessities to which any child is entitled.”<sup>39</sup>

Child support obligations are held to a standard of strict liability, meaning a father is liable for child support to his biological children regardless of any misconduct by the biological mother.<sup>40</sup> Women’s misconduct can happen in several forms.<sup>41</sup> One example of misconduct is paternity fraud: lying to a man by telling him a child is his when the child is not in order to secure child support payments.<sup>42</sup> Another form of misconduct is contraceptive fraud, which occurs when a woman lies to her partner regarding the use of contraceptives that leads him to forgo using condoms and a child is conceived as a result.<sup>43</sup>

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Assistance to Needy Families program, states are given funding in exchange for the state instituting an agreeable plan based on the federal government’s necessary requirements. *See id.* at 415.

39. MADDEX, *supra* note 29, at 66 (describing purpose of child support). Further, child support obligations of the parent assures the government that the child in question will avoid becoming a ward of the state or, if the child does require welfare benefits for support, the government will receive reimbursement as child support obligations are nondischargeable. *See Higdon, supra* note 1, at 414-16.

40. *See Higdon, supra* note 1, at 411, 413-14 (introducing history of child support); Lewis, *supra* note 30, at 263 (stating regardless of voluntariness and legality of conception, both parties liable for support); Gross, *supra* note 31, at 1026-27 (noting man cannot make child victim of mother’s conduct by not paying); cf. “*Roe vs. Wade for Men: Our View of the Decision*,” NAT’L CENTER FOR MEN, <http://www.nationalcenterformen.org/page9.shtml> (last visited Feb. 7, 2015), archived at <http://perma.cc/9KZ8-UB98> (explaining women’s procreational rights allow them to escape forced parenthood, including support obligations).

41. *See generally* Higdon, *supra* note 1 (analyzing child support obligations in response to paternity fraud, sperm stealing, rape, and statutory rape); Lewis, *supra* note 30, at 268-71 (analyzing liability of men in situations of rape, statutory rape, and contraception fraud); Christopher Bruno, Note, *A Right To Decide Not To Be a Legal Father: Gonzales v. Carhart and the Acceptance of Emotional Harm as a Constitutionally Protected Interest*, 77 GEO. WASH. L. REV. 141 (2008) (analyzing fatherhood in situations of contraceptive fraud, rape, statutory rape, and sperm stashing).

42. *See Higdon, supra* note 1, at 421-22 (explaining paternity fraud); *see also* Godin v. Godin, 725 A.2d 904, 907 (Vt. 1998) (holding paternity fraud as fraud upon individual not upon court); Melanie B. Jacobs, *When Daddy Doesn’t Want To Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193 (2004) (criticizing paternity fraud claims).

43. *See* *Dubay v. Wells*, 506 F.3d 422, 426-27, 431 (6th Cir. 2007) (holding father failed to state claim when filing suit for contraceptive fraud); *L. Pamela P. v. Frank S.*, 449 N.E.2d 713, 716 (N.Y. 1983) (holding contraceptive fraud does not violate constitutional rights); *Henson v. Sorrell*, No. 02A01-9711-CV-00291, 1999 WL 5630, at \*6-7 (Tenn. Ct. App. June 28, 1999) (holding father liable for parental responsibilities regardless of contraceptive fraud by mother); Lewis, *supra* note 30, at 268-69 (discussing contraceptive fraud); Liz Jones, *The Craving for a Baby That Drives Women to the Ultimate Deception: Liz Jones Makes Her Most Shocking Confession Yet*, DAILY MAIL, <http://www.dailymail.co.uk/femail/article-2056875/Liz-Jones-baby-craving-drove-steal-husbands-sperm-ultimate-deception.html> (last updated Nov. 3, 2011) (recounting personal and friends’ stories of contraceptive fraud in attempt to conceive against partners’ wishes); Laura Wish Morgan, *It’s Ten O’clock: Do You Know Where Your Sperm Are?: Toward a Strict Liability Theory of Parentage*, SUPPORT GUIDELINES, <http://childsupportguidelines.com/articles/art199903.html> (last updated May 19, 2002), archived at <http://perma.cc/3AJE-B4KM> (“A woman’s fraudulent misrepresentation regarding the use of birth control . . . never shield[s] the father from child support liability.”). *But see* *Roe vs. Wade for Men, supra* note 40 (characterizing *Dubay* decision as childish, inappropriately sarcastic, and biased); Press Release, The Nat’l Ctr. for Men, *Roe vs. Wade . . . for Men: Men’s Center Files Pro-Choice Lawsuit in Federal Court: Distributes Men’s “Reproductive Rights Affidavit,” available at* <http://www.nationalcenterformen.org/page7.shtml>, archived at <http://perma.cc/4DUL-EC5U> (criticizing judge in *Dubay* as sexist and closed-minded and

There is also the misconduct that this Note will focus on: the unauthorized use of sperm, including statutory rape, rape, and sperm stashing.<sup>44</sup>

Courts find that misconduct is irrelevant to child support determinations because the support goes to the child, not the mother; she receives no benefit.<sup>45</sup> Thus, she is not benefiting from any wrongdoing.<sup>46</sup> Those who oppose strict liability, however, note that the mother does benefit from child support payments because it reduces the burden that the best interest of the child places on her own income.<sup>47</sup> When misconduct is involved, those who oppose strict liability believe “the burden of raising a child, one which she undertook herself, is one for which she should be solely responsible.”<sup>48</sup>

Overall, strict liability makes securing child support easier by creating a bright line rule and avoiding any litigation of whether child support obligations are equitable, but as a result, the rights of a few—including rape victims—are forfeited for judicial economy and preservation of federal funds.<sup>49</sup> Critics argue that strict liability is inappropriate for five reasons: it mischaracterizes the issue, places responsibility on the wrong party, trivializes sexual assault against men, relies on impermissible gender stereotypes, and ignores male reproductive choice.<sup>50</sup> If the mother seeks welfare benefits for the child, the child will receive those benefits whether or not the state can collect from the victimized father.<sup>51</sup> Thus, the real issue is that the state is the one in danger of losing money, not the child.<sup>52</sup> Next, holding men liable when they are raped—statutorily or otherwise—punishes them for being victimized when responsibility should fall on the government’s shoulders; every state has laws supporting policies that people should not bear the financial costs of their

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implying case not given fair consideration). *See generally* Bruno, *supra* note 41 (recognizing contraceptive fraud). These causes of action are not recognized because collecting evidence of these claims is difficult, and thus, the causes of action could be easily manipulated by men who voluntarily participated in unprotected, nondeceptive sex and seek to discharge responsibility for their children. *See* Lewis, *supra* note 30, at 268-69.

44. *See generally, e.g.,* Higdon, *supra* note 1 (analyzing child support obligations in response to sperm stealing, rape, and statutory rape); Lewis, *supra* note 30 (considering liability of men in situations of rape and statutory rape); Bruno, *supra* note 41 (analyzing right to relief in situations of rape, statutory rape, and sperm stashing).

45. *See* Lewis, *supra* note 30, at 275 (noting argument of courts).

46. *See id.*

47. *See id.* (advocating position deceptive mother mostly or entirely responsible for child support).

48. *Id.* at 271-79 (arguing misconduct deserves extra financial responsibility of child).

49. *See* Higdon, *supra* note 1, at 431-32 (analyzing shortcomings of strict liability standard for child support obligations).

50. *See id.* at 432-39 (arguing strict liability standard inappropriate in sperm stealing situations). Holding victims of statutory rape liable for child support obligations is not only oxymoronic to the overarching policy of doing what is in the best interest of the child, it also creates a host of new problems for the young obligors. *See id.* at 432.

51. *See id.* at 432-33 (first alteration in original) (“[O]nly way a child . . . benefit[s] . . . [is] where the father pays more in child support than the state pays in welfare”); Lewis, *supra* note 30, at 271-79 (pinpointing government as party that benefits).

52. *See* Higdon, *supra* note 1, at 433 (establishing policy favors recouping welfare benefits not providing for child).

victimization.<sup>53</sup> Such laws are justified on either a shared risk theory—all citizens share in the risks and victimization of crimes—or the moral obligation theory—the state owes a moral responsibility to crime victims.<sup>54</sup> Additionally, these obligations exacerbate the psychological harms of sexual assault that these men experience.<sup>55</sup> Although studies on the effects of assault on male victims are not numerous, one study—specifically with victims of statutory rape—shows that rape impacts boys’ attendance in school, can lead to drug and alcohol use, and increases the likelihood the victim will participate in criminal activity.<sup>56</sup> For example, the victim in *J.J.G. v. L.H.* had been hospitalized for psychiatric problems and could not hold a permanent job due to his victimization.<sup>57</sup> Imposing the responsibility of child support only amplifies these consequences.<sup>58</sup> Further, in similar cases, female victims are not typically liable for support of the child and are deemed incapable of making voluntary decisions to be mothers.<sup>59</sup> Lastly, the standard ignores a male’s reproductive choice because a female in a similar situation could abort or put the child up for adoption, whereas a male is forced to be held responsible for the consequences of his victimization, violating his reproductive choice.<sup>60</sup>

## *B. Treatment of Men and Women in Family Law: Is There a Right Not To Be a Parent?*

### *1. Constitutional Background*

The constitutionally protected freedom from governmental intrusion into one’s reproductive decision making began its evolution with the establishment

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53. See *id.* at 433-34 (quoting Ruth Jones, *Inequality from Gender-Neutral Laws: Why Must Male Victims of Statutory Rape Pay Child Support for Children Resulting from Their Victimization?*, 36 GA. L. REV. 411, 456 (2002)) (“[L]egislatures do not believe these persons should have to bear the financial costs of their victimization.”); Lewis, *supra* note 30, at 276 (stating children already provided for by government; thus government only party benefited).

54. See Higdon, *supra* note 1, at 433-34 (explaining rationales of states shouldering financial burden of victimization).

55. See *id.* at 435 (concluding child support obligation serves as sentence of continuing victimization); Lewis, *supra* note 30, at 270-71 (labeling liability of statutory rape victims as further victimization); Bruno, *supra* note 41, at 142 (arguing emotional and psychological harm caused when fathers write child support checks).

56. See Higdon, *supra* note 1, at 435 (finding states fail to protect male victims of statutory rape).

57. See 441 N.W.2d 273, 276 (Wis. Ct. App. 1989) (outlining psychological effects of victimization).

58. See Higdon, *supra* note 1, at 432 (highlighting negative effects of child support obligations on statutory rape victims).

59. See *id.* (noting blatant gender inequality in obligations of child support between victims of sexual assault); Lewis, *supra* note 30, at 269 (highlighting gender disparity); see also DCSE/*Esther M.C. v. Mary L.*, No. 38812, 1994 WL 811732, at \*3 (Del. Fam. Ct. Jan. 3, 1994) (finding *female* incest victim not responsible for support of child conceived by incest).

60. See Higdon, *supra* note 1, at 438 (arguing such obligations and unequal treatment may violate men’s constitutional right to reproductive autonomy).

of a man's fundamental right to procreate.<sup>61</sup> In *Skinner*, the Supreme Court of the United States found the forced sterilization of prison inmates unconstitutional as it eliminated the inmates' fundamental right to procreate.<sup>62</sup> Conversely, the freedom from governmental intrusion on the decision not to procreate has focused on a woman's right to choose.<sup>63</sup> One of the first steps towards a constitutional freedom from governmental intrusion into one's reproductive choice developed in *Griswold v. Connecticut*, in which the Court declared the constitutional right to privacy.<sup>64</sup> The Court held that the right to privacy embodied a married couple's right to choose to use contraceptives to prevent pregnancy free from governmental intrusion in their own home.<sup>65</sup> In *Eisenstadt v. Baird*, this right of privacy—including the freedom to choose to use contraceptives—was extended to single people.<sup>66</sup> Further evolution of the freedom from governmental intrusion into the choice not to procreate through the use of contraceptives occurred in *Carey v. Population Services International*, which bestowed the freedom to minors.<sup>67</sup>

The reproductive freedom jurisprudence gained more momentum as the freedom extended past mere contraceptives to abortion.<sup>68</sup> Such a freedom was found in the right to privacy previously established in *Griswold*.<sup>69</sup> *Roe v. Wade*—arguably the Court's most famous decision—declared a woman's freedom to choose to obtain an abortion, within certain parameters, overrode the states' obligations to unborn children.<sup>70</sup> Prior to *Roe*, all states prohibited abortions by statute, some declaring exceptions only for incest, rape, or fetal deformity.<sup>71</sup> After *Roe*, many called for the decision's repeal, and some hoped that *Planned Parenthood of Southeastern Pennsylvania v. Casey* would provide

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61. See *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942) (holding males have right to procreate).

62. See *id.* at 536-37, 541-42 ("The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects.")

63. See generally *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (striking down statute requiring married women to obtain husband's consent to abortion); *Roe v. Wade*, 410 U.S. 113 (1973) (establishing woman's right to choose abortion).

64. See 381 U.S. 479, 484-85 (1965) (finding right to privacy in penumbras of First, Third, Fourth, Fifth, Ninth, and Fourteenth amendments).

65. See *id.* at 485-86 (finding idea of police searching marital bedroom for contraceptives "repulsive to . . . privacy surrounding the marriage relationship").

66. See 405 U.S. 438, 453 (1972) (extending right to contraceptives to single people). "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* The Court reasoned that a married couple is made up of two individuals, each with his or her own decision-making power and rights. See *id.*

67. See 431 U.S. 678, 693 (1977) (holding ban on contraceptives to minors unconstitutional).

68. See *Roe v. Wade*, 410 U.S. 113, 153-54 (1973) (holding women's ability to procure abortion not without limitations).

69. See *id.* at 153 (concluding right to privacy includes woman's decision to terminate pregnancy).

70. See *id.* at 163-64 (outlining when state can intrude upon woman's choice to abort).

71. See MADDEX, *supra* note 29, at 1 (detailing history and legal implications of abortion). Specifically, the Texas statute challenged in *Roe* only allowed abortions to save a woman's life. See 410 U.S. at 118.



such an opportunity.<sup>72</sup> Those hopes were dashed as the Court upheld *Roe*, but the Court also held that the freedom for a woman to obtain an abortion without governmental intrusion was subject to limitations, more so than *Roe* chose to acknowledge.<sup>73</sup> Overall, these decisions and the evolution of the reproductive choice jurisprudence established the Court's implicit declaration that "a significant element of [American] freedom is the freedom to choose if and when to have children."<sup>74</sup>

Some have argued that *Roe* stands for the right not to be a parent.<sup>75</sup> Those who argue such a reading of the case law reason that *Roe*'s holding cannot only be grounded in bodily integrity but also procreational autonomy because the freedom from governmental intrusion into issues regarding bodily integrity—including an abortion—is not absolute.<sup>76</sup> The state can impose upon the freedom for certain reasons: *Casey* provided limitations on the freedom and focused on procreational autonomy; states are not required to provide abortions, only to protect the decision-making process; and other subsequent decisions have restricted the methods that can be used during an abortion.<sup>77</sup>

## 2. *Unequal Treatment of Men in Reproductive Rights Jurisprudence*

The Supreme Court decisions that focus on procreational autonomy should apply equally to males and females, but the courts have focused on female autonomy and virtually ignored the procreational rights of men.<sup>78</sup> Men and women have different roles when it comes to reproduction; "men's participation in the reproductive process is, in effect, limited to their contribution of sperm."<sup>79</sup> "Prospective fathers in the United States have essentially no legal rights concerning whether a pregnancy is carried through or terminated. This means that prospective fathers, unlike pregnant women, cannot unilaterally opt to have a pregnancy terminated nor can they ensure that a pregnancy be brought to term."<sup>80</sup> Some expecting fathers have tried to take

72. See MADDEX, *supra* note 29, at 245 (explaining *Casey* decision's societal context).

73. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860-69 (1992) (modifying *Roe*).

74. MADDEX, *supra* note 29, at 79, 82 (outlining constitutional, procreative choice jurisprudence).

75. See Bruno, *supra* note 41, at 148-50 ("*Roe* and its progeny emphasize protecting procreative autonomy, not just bodily integrity.>").

76. See *id.* (arguing right to not have children exists).

77. See *id.* (reasoning *Roe* stands for right not to have children).

78. See Lewis, *supra* note 30, at 264 (noting male reproductive choice goes unnoticed); Gross, *supra* note 31, at 1016 (acknowledging society and law highlights female procreational rights and male rights fall by wayside).

79. WILLIAM MARSIGLIO, PROCREATIVE MAN 50 (1998) (explaining different physiological aspects of male and female reproduction affects views on reproduction).

80. *Id.* at 61 (footnote omitted) (arguing effect of abortion jurisprudence has legally silenced men on abortion question). Professor Marsiglio states, with the exception of causing a miscarriage, a man in the United States has "no direct or legal means to intervene in the reproductive process." *Id.* at 86. "Only women have the extraordinary freedom to enjoy sexual intimacy free from the fear of forced parenthood." *Our Issues*, NAT'L CENTER FOR MEN, <http://www.nationalcenterformen.org/page3.shtml> (last visited Feb. 7, 2015), archived at

legal action to enjoin women from obtaining abortions against their wishes or to force a woman to get an abortion, but all have been unsuccessful as courts hold a woman's constitutional freedom to decide to obtain an abortion paramount.<sup>81</sup> Depending on their religious views, moral beliefs, or lack of such values, men may believe they are being responsible in encouraging their partner to have or abstain from having an abortion.<sup>82</sup> Yet—regardless of their views—unless their partner agrees, their choice is legally irrelevant; some justify this by stating that men have the choice to engage in sex and after that point they must deal with the consequences.<sup>83</sup> “By virtue of biology, because a woman is the one to bear the child, it so happens that men must exercise their rights not to bear children earlier than women, that is, in the bedroom and not at the abortion clinic or the courtroom.”<sup>84</sup> Others, however, find that if the woman decides to leave the man out of the decision-making process, her independence should continue in sole support of the child.<sup>85</sup> As a result, many scholars have argued for—and groups have developed to promote and obtain—a more equal balance between male and female reproductive rights.<sup>86</sup>

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<http://perma.cc/D4YD-VTGF> (noting “men have responsibilities without rights”).

81. See *Doe v. Smith*, 486 U.S. 1308, 1310-11 (1988) (affirming woman's choice to abort outweighs father's desire to have child); *State, Dep't of Soc. Servs. v. McCorkle*, 694 So. 2d 1077, 1080 (La. Ct. App. 1997) (concluding choice to abort purely woman's choice); *McKenzie v. Thomas*, 678 So. 2d 42, 47 (La. Ct. App. 1996) (holding defendant male's choice to abort irrelevant); MARSIGLIO, *supra* note 79, at 61, 93-94 (observing men might feel uneasy and angry when abortion procured against wishes); Gross, *supra* note 31, at 1033-36 (stating these actions interfere with women's constitutionally protected rights). *But see* Belluck, *supra* note 20 (suggesting future technological advances may give men rights to prevent abortion). Belluck states, “Fathers may end up with rights in abortion cases . . . ‘if the day ever comes when men can become pregnant or we have artificial incubators’ so that a woman's womb is unnecessary.” *Id.*

82. See MARSIGLIO, *supra* note 83, at 26 (noting differing views can affect what men deem responsible when faced with unplanned pregnancy). Even if a man is willing to support his partner's choice for abortion, only twelve percent of clinics will allow him to be present during the procedure, and a similar percentage allow him to be present in the recovery room. See *id.* at 46-47. These procedures of abortion clinics isolate men when considering the large number of them willing to support their partners during abortions. See *id.* at 47. One study shows that fifty-six to eighty percent of men who accompany their partner to the clinic would be willing to be in the room with her, and ninety percent of these men would like to be in the recovery room with her. See *id.* Further, other men may be restricted from participating in the process due to their partner's wishes against it. See *id.* (stating lack of opportunity to participate has negative effects on males' reproductive conscious and responsibility).

83. See *id.* at 97 (discussing rationales for female autonomy of choice).

84. Morgan, *supra* note 43; see also *L. Pamela P. v. Frank S.*, 449 N.E.2d 713, 716 (N.Y. 1983) (implying males' constitutional right to choose not to procreate limited to choice to use contraception). “The choice available to a woman vests in her by the fact that she, and not the man, must carry the child and must undergo whatever traumas, physical and mental, may be attendant to either childbirth or abortion.” *Ince v. Bates*, 558 P.2d 1253, 1254 (Or. Ct. App. 1977).

85. See MARSIGLIO, *supra* note 79, at 97 (explaining various arguments for and against women's ultimate decision).

86. See *id.* at 98-99 (outlining various men's rights groups and endeavors of each); see also, e.g., Bruno, *supra* note 41, at 143-44 (arguing for constitutional right not to parent); Dalton Conley, *A Man's Right To Choose*, N.Y. TIMES (Dec. 1, 2005), <http://www.nytimes.com/2005/12/01/opinion/01conley.html?pagewanted=all&r=0> (“[I]f we want to make fathers relevant, they need rights, too.”); *Men's Advocacy-Counseling: How We Can Help You*, NAT'L CENTER FOR MEN, <http://www.nationalcenterformen.org/page2.shtml> (last visited

Those who argue a right not to be a legal parent exists find the right—one of both genders—is coupled with the right not to be a biological parent—solely a right of women—to form the right not to procreate.<sup>87</sup> These scholars note that when courts impose legal parentage on men in certain situations—such as sperm stashing, rape, or statutory rape—the courts are infringing upon these men’s constitutional rights by not allowing them to decide whether they want to be defined as a legal parent.<sup>88</sup> These scholars’ reasoning relies upon the distinction between a legal, biological, and social parent, noting that not all biological parents are legal parents.<sup>89</sup> Further, the declaration of parentage also provides these men with severe psychological and emotional harms.<sup>90</sup> These

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Feb. 7, 2015), archived at <http://perma.cc/949J-AUQE> [hereinafter *Men’s Advocacy-Counseling*] (explaining services provided such as counseling and referrals); *Our Issues*, supra note 80 (outlining mission of organization). The National Center for Men (NCM) works specifically to provide equal rights for men, particularly in family law, bring awareness to men’s issues, male health, and male homelessness. See *Our Issues*, supra note 80. NCM provides counseling and consultation sessions, particularly over the phone, to men regarding divorce, forced fatherhood, domestic violence, employment discrimination, and other men’s issues. See *Men’s Advocacy-Counseling*, supra. NCM also advocates for men’s issues on a national scale with the goal to provide men with equal rights and refer these men to other advocates of men’s rights for legal services and psychotherapy if necessary. See *id.* The organization also helps men bring lawsuits, such as the well-known contraceptive fraud case *Dubay*; the case was nicknamed “*Roe v. Wade* for men” by NCM because the organization hoped it would extend to men the principles of reproductive choice *Roe* gave to women. See Press Release, The Nat’l Ctr. for Men, supra note 43 (announcing *Dubay* suit). In response to *Dubay* and similar cases, NCM created the Reproductive Rights Affidavit, which the organization distributes on its website, to urge men and women to discuss the responsibilities of both partners in the case of an unplanned child. See *id.* The affidavit reads in part, “I will not recognize the moral authority of a court to strip me of my constitutional right to reproductive choice. I will challenge any court order that seeks to impose a parental obligation upon me against my will by asserting my right to equal protection of the law.” *Id.* NCM’s projects have received criticism that they neglect the best interest of the child. See MARSIGLIO, supra note 79, at 99.

87. See Bruno, supra note 41, at 150-51 (distinguishing between biological parent and legal parent).

88. See *id.* at 152 (observing legal parentage harms male procreational rights in certain situations).

89. See *id.* at 150-51 (noting, for example, courts do not allow parental rights to male rapists). A man becomes a biological father when the child is born, a social father based upon society’s ideals of how a father behaves, and a legal father when the law says he is the father and then assumes legal obligations, duties, privileges, and responsibilities to that child. See *id.*

90. See *id.* at 154-55 (comparing situation to men who have severe reaction when their partner has abortion they oppose). Men whose partner has an abortion they oppose have been documented as having severe psychological and physiological reactions—including having symptoms that occur during a pregnancy known as *couvade syndrome*—based upon feelings of anxiety, fear, and grief. See *id.*; D. Naziri, *Man’s Involvement in the Experience of Abortion and the Dynamics of the Couple’s Relationship: A Clinical Study*, 12 EUROPEAN J. CONTRACEPTION & REPROD. HEALTH CARE 168, 170-71 (2007) (finding men experience regret, guilt, powerlessness, helplessness, sadness, frustration, conflict, and anger due to abortion). In a European study on men’s reactions to their partners’ abortions, one man stated, “I would like to take . . . the fetus and let it grow somewhere else and be able to take care of it myself . . .” Naziri, supra, at 170. Psychological harms stay with these men for years, as Dalton Conley—Director of New York University’s Center for Advanced Social Science Research—stated, even a decade after his ex-girlfriend procured an abortion against his wishes he still thinks about “the fateful decision, and frustration boils up.” See Conley, supra note 86 (advocating for increased fathers’ rights). These reactions suggest that biological fatherhood is associated with profound and intricate responses regardless if fatherhood is wanted or not. See Bruno, supra note 41, at 154-55.

harms, coupled with the decision of *Gonzalez v. Carhart*,<sup>91</sup> have drawn the attention of those who argue for equal procreational rights for men because that decision limited the modes of abortion available to protect women from post-abortion regret.<sup>92</sup> Scholars who advocate for equality find that men experience similar emotions to being deemed a legal parent in situations such as sperm stashing, rape, and statutory rape.<sup>93</sup> Thus, that interest should be equally protected, and the Supreme Court should recognize a man's right to decide not to be a legal father.<sup>94</sup> State action that imposes on a man's right of being free from this emotional trauma would be the judicial action declaring parentage.<sup>95</sup> Under these and similar reasons, men have brought suits to either prevent or force women to have an abortion.<sup>96</sup> In these cases, the Supreme Court has recognized not only the financial burdens on fathers but also the emotional and psychological burdens of having an unwanted child and the decision to have an abortion.<sup>97</sup>

### C. *The Unauthorized Use of Sperm: Sperm Stealers*

Male victims of rape, statutory rape, and sperm stashing are held liable for their victimization—namely in the form of child support—whereas men who participate in ART escape liability.<sup>98</sup> The treatment of men in situations not involving ART shows a disregard for males' reproductive autonomy because these men never had a choice in deciding to reproduce.<sup>99</sup>

#### 1. *Statutory Rape*

Statutory rape relies on the principle that children under a certain age lack the capacity to consent to sexual relations because they are too young to understand the meaning of such consent.<sup>100</sup> Each state has its own laws

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91. 550 U.S. 124 (2007).

92. See Bruno, *supra* note 41, at 161-62 (finding *Gonzalez* validates constitutional interest in emotional consequences associated with procreative autonomy); cf. Naziri, *supra* note 90, at 169 (“[M]en, like women, face the thorny ethical consequences of abortion.”).

93. See Bruno, *supra* note 41, at 161-62 (analyzing male perspective).

94. See *id.* (arguing recognition of post-abortion regret deems necessary recognition of father's rights to renounce legal parentage).

95. See *id.* at 163 (recognizing such declaration more than merely announcement of biological fact).

96. See *Doe v. Smith*, 486 U.S. 1308, 1308-09 (1988) (describing case where man sought to enjoin woman from obtaining abortion); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976) (holding abortion purely female choice); see also Bruno, *supra* note 41, at 157-58 (noting men bring suits to prevent abortions). “If a father is willing to legally commit to raising a child with no help from the mother he should be able to obtain an injunction against the abortion of the fetus he helped create . . . [o]therwise, don't expect anything more of me than a few million sperm.” Conley, *supra* note 86.

97. See Bruno, *supra* note 41, at 154-58 (discussing harms fathers face from unwanted pregnancy).

98. See Lewis, *supra* note 30, at 260 (acknowledging difference in treatment given to men who participate in ART situations).

99. See *id.* (highlighting unfair treatment of men in family law).

100. See CAROLYN COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES* 1-

regarding age of consent, minimum age for a defendant to be tried, and whether the age gap between the victim and offender is relevant.<sup>101</sup> Regardless of the jurisdiction, however, a minor's consent to the sexual act(s) or the offender's misunderstanding of the child's age, regardless of good faith, are irrelevant because statutory rape laws typically hold the offender strictly liable.<sup>102</sup> Thus, as long as the prosecution can prove the defendant and alleged victim participated in a sexual act and at the time of the sexual act the child was below the age of consent, the requirements of statutory rape are satisfied.<sup>103</sup> Statutory rape, like nonstatutory rape, occurs mostly upon female victims, but males can also fall victim to rapists.<sup>104</sup> Males' treatment in regard to statutory rape, however, is much different than the treatment of their female counterparts.<sup>105</sup> "Cases involving young males with older females are most readily perceived . . . as if one's male gender surpasses one's age as enabling or encouraging sexual behavior."<sup>106</sup> Overall, the different treatment of male and female victims of

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2 (2004) (introducing statutory rape); MADDEX, *supra* note 29, at 274-75 (describing crime of statutory rape). The main goal of modern statutory rape laws is to protect "the very young and the vulnerable from unequal, manipulative, or predatory relationships." COCCA, *supra*, at 2.

101. See MADDEX, *supra* note 29, at 276 (comparing basic variations of statutory rape laws by state in chart). Some states have gender neutral laws regarding statutory rape, but others specify whether the victim is male or female. See *id.* at 275. Some states have enacted laws that find minors who engage in sexual acts with other minors as statutory rape offenders, but these laws hold them to more lenient standards than adult offenders. See *id.*

102. See *id.* at 275 (outlining various aspects to statutory rape laws). A minority of jurisdictions allow "mistake-of-age" defenses, allowing a defendant to raise the defense that he or she believed the victim was over the age of majority. See COCCA, *supra* note 100, at 10.

103. See MADDEX, *supra* note 29, at 275 (outlining elements of statutory rape defense).

104. See *id.* at 271 (describing crime of rape). It is important to note that this source focuses upon male victimization by other males during its brief discussion of males as rape victims. See *id.* (describing male victimization in "restricted settings" like prison and military). When the author does discuss a woman's role, such discussion focuses on the woman as an accomplice rather than an offender. See *id.* Historically, statutory rape laws only recognized females as victims, but in the 1970s, some feminists found such gender bias deprived females of the privilege to consent to sexual acts as males could and neglected males as a class of victims. See COCCA, *supra* note 100, at 18-19. Other feminists, however, found such gender-neutral laws harmful to gender equality, claiming sexual encounters early in life affected men and women differently. See *id.* at 19. Maddex's limited discussion on males as victims of heterosexual statutory rape and the historical avoidance of naming males as possible victims are due in part to the infrequency of women committing statutory rape. Cf. COCCA, *supra* note 100, at 88 n.38 (summarizing criminal statistics of female statutory rapists).

105. See COCCA, *supra* note 100, at 92 (concluding gender-neutral statutory rape laws have not dissolved stereotypes of males welcoming sexual interactions).

106. *Id.* (finding feminist ideals of gender equality from statutory rape laws wishful thinking). Compare *Cnty. of San Luis Obispo v. Nathaniel J.*, 57 Cal. Rptr. 2d 843, 844 (Ct. App. 1996) (refusing to label fifteen-year-old boy who fathered child with thirty-four-year-old woman "victim"), and *Mercer Cnty. Dep't of Soc. Servs. v. Alf M.*, 589 N.Y.S.2d 288, 289 (Fam. Ct. 1992) (refusing to "give credit" to sixteen-year-old boy's allegations of rape by child's mother), with Matthew Brown, *G. Todd Baugh, Montana Judge Apologizes for Comments About Teen Rape Victim*, HUFFINGTON POST (Aug. 29, 2013), [http://www.huffingtonpost.com/2013/08/29/g-todd-baugh-apology-rape-comments\\_n\\_3834769.html](http://www.huffingtonpost.com/2013/08/29/g-todd-baugh-apology-rape-comments_n_3834769.html), archived at <http://perma.cc/B8MQ-3QP4> (explaining national outrage when Montana judge stated female statutory rape victim acted older than fourteen). According to the *Nathaniel J.* court: "It does not necessarily follow that a minor over the age of 14 who voluntarily engages in sexual intercourse is a victim of sexual abuse." 57 Cal. Rptr. 2d at 844. Similar judicial comments regarding female statutory rape victims, however, can spur national outrage. See Brown,

statutory rape shows the influence of gender-based stereotypes that label females as sexual victims and males as sexual aggressors.<sup>107</sup>

Although statutory rape happens less often to males than females, it still happens somewhat frequently and too often results in pregnancy.<sup>108</sup> These male victims, unlike their female peers in similar situations, are not given the right to choose what happens to the consequences of their victimization when the female statutory rapists become pregnant.<sup>109</sup> Rather, they are held responsible for child support obligations because courts focus on actual rather than legal consent and tend to favor a finding of actual consent when deciding child support in these cases.<sup>110</sup> Courts rationalize these obligations by finding “public policy mandating parental support of children overrides any policy of protecting a minor from improvident acts,” even if criminal activity on the part of the other parent is involved.<sup>111</sup> Such decisions result from gender-based stereotypes discussed above, which reduce sympathy for male victims.<sup>112</sup>

There is an example of a court relying on equitable principles to relieve a boy—who was fourteen when he fell victim to statutory rape—of child support, but that decision was overruled on appeal in *L.M.E. v. A.R.S.*<sup>113</sup> In *County of*

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*supra*. For example, a Montana judge, who stated a fourteen-year-old girl who was statutorily raped was “older than her chronological age,” received condemnation nationwide, including far-reaching media attention, protests, a rally at the courthouse calling for his resignation, a slogan “14 is 14,” and comment from the state’s governor. *See id.*

107. *See Lewis, supra* note 30, at 270 (highlighting gender-based stereotypes influence enforcement of statutory rape laws); *see also Nathaniel J.*, 57 Cal. Rptr. 2d at 844 (finding male statutory rape victim not innocent); *State ex rel. Hermesmann v. Seyer*, 847 P.2d 1273, 1277 (Kan. 1993) (implying male statutory rape victim at fault).

108. *See Higdon, supra* note 1, at 424 (summarizing frequency of statutory rape of males resulting in pregnancy).

109. *See id.* at 424-26 (describing lack of male reproductive choice); Morgan, *supra* note 43 (recognizing men and women differently situated).

110. *See Higdon, supra* note 1, at 424 (declaring every court has held minor father liable for child support resulting from victimization); *see also, e.g., Nathaniel J.*, 57 Cal. Rptr. 2d at 844-45 (finding fifteen-year-old boy liable to thirty-four-year-old woman who raped him for support of resulting daughter); *State ex rel. Hermesmann*, 847 P.2d at 1279 (finding thirteen-year-old boy liable for child support); *Jevning v. Cichos*, 499 N.W.2d 515, 517 (Minn. Ct. App. 1993) (stating child support for child’s welfare not for any benefit of custodial parent); *Alf M.*, 589 N.Y.S.2d at 290 (suggesting father may press criminal charges against mother without risk of penalizing the child); *J.J.G. v. L.H.*, 441 N.W.2d 273, 274-76 (Wis. Ct. App. 1989) (determining boy actually consented because two kissed and hugged). “The age of a putative father is irrelevant to a paternity proceeding and . . . will not excuse his obligation to support the child . . . . The primary purpose of a paternity proceeding is to protect the welfare of the illegitimate child and, accordingly, the mother’s conduct should have no bearing . . . .” *Alf M.*, 589 N.Y.S.2d at 289 (quoting *Weinberg v. Omar E.*, 482 N.Y.S.2d 540, 541 (App. Div. 1984)).

111. *State ex rel. Hermesmann*, 847 P.2d at 1279 (describing case where twelve-year-old boy and his sixteen-year-old babysitter engaged in sexual relationship). This policy rests on the assumption that the child desired to engage in this activity to some extent. *See id.* at 1278 (labeling victimization “their improvident conduct” and such victims “reckless minors”).

112. *See Lewis, supra* note 30, at 270 (stating “stereotypes reduce sympathy for male victims” and produce decisions contradictory to statutory rape policies).

113. *See L.M.E. v. A.R.S.*, 680 N.W.2d 902, 905 (Mich. Ct. App. 2004) (reversing trial court which “applied equitable principles to deny the petition for child support”). In *L.M.E.*, the woman was married when

*San Luis Obispo v. Nathaniel J.*, a fifteen-year-old boy had a sexual relationship with a thirty-four-year-old woman and a daughter resulted.<sup>114</sup> During the investigation that led to the conviction of unlawful sexual intercourse with a minor, the boy told police the sexual intercourse was mutual.<sup>115</sup> Nathaniel J. argued “exacting child support from a victim of statutory rape violates [the] public policy . . . that . . . protects [minors] from the effects of sexual exploitation by an adult” and inflicts an economic loss on a crime victim, which is contrary to established policy and law.<sup>116</sup> The court disagreed, only delaying an order of child support for when he reached the age of majority because he was “not an innocent victim.”<sup>117</sup> The holding in *Nathaniel J.* paradoxically found him liable for child support—pending review—because he was at “fault” even though, by law, he could not consent to sexual activity.<sup>118</sup> Similarly, in *J.J.G. v. L.H.*, a fifteen-year-old boy was found liable for child support of a child conceived from statutory rape, and he was found to have actually consented to the sexual conduct based upon hugs and kisses he and the offender exchanged.<sup>119</sup> The court rejected his equal protection arguments that rested upon his inability to obtain an abortion or relinquish parental responsibilities even though a female in his situation could.<sup>120</sup> Conversely, if a female victim of statutory rape decided to relinquish parental responsibilities, “it is doubtful that a court would decide that [s]he was not an ‘innocent victim’ or mention [her] role in [her] own victimization.”<sup>121</sup>

## 2. Nonstatutory Rape

Rape is nonconsensual sexual activity, usually by force or threat.<sup>122</sup> The

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the statutory rape occurred, and the victim did not find out he was the father of the child until the action was brought ten years later when the woman found herself divorced. *See id.* at 905.

114. *See* Cnty. of San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d 843, 843-44 (Ct. App. 1996) (describing factual background of case).

115. *See id.*

116. *Id.* at 844 (outlining Nathaniel J.’s argument).

117. *See id.* (explaining court’s finding).

118. *See* Higdon, *supra* note 1, at 425 (criticizing holding of *Nathaniel J.* and similar cases). The court in *Nathaniel J.* reasoned, as many other courts have, “It does not necessarily follow that a minor over the age of 14 who voluntarily engages in sexual intercourse is a victim of sexual abuse.” *Nathaniel J.*, 57 Cal. Rptr. 2d at 844.

119. *See* 441 N.W.2d 273, 276 (Wis. Ct. App. 1989) (“The hugging, kissing, petting . . . leading to intercourse can only be read as evidence of his willing and voluntary participation.”). Similarly, in *Mercer County Department of Social Services v. Alf M.*, a sixteen-year-old boy contested child support obligations of a child he fathered with a twenty-one-year-old woman based upon both legal and actual consent, but the court quickly dismissed both claims. *See* 589 N.Y.S.2d 288, 289-90 (Fam. Ct. 1992). As in similar cases, the court determined that the young age of the woman nullified the possibility of lack of actual consent. *Cf. id.*; *J.J.G.*, 441 N.W.2d at 274-75 (focusing on young age of female rapist).

120. *See J.J.G.*, 441 N.W.2d at 277 (finding equal protection claims without merit).

121. Lewis, *supra* note 30, at 270 (claiming female victims treated differently than males in regards to statutory rape).

122. BLACK’S LAW DICTIONARY 622 (4th pocket ed. 2011) (defining rape).

majority of rapes and sexual assaults that occur in the United States are date rapes or acquaintance rapes, meaning the rapes are committed by someone the victim knows.<sup>123</sup> Roughly half of these victims consider committing suicide.<sup>124</sup> Often, this type of rape is aided by the use of drugs or alcohol on the victim.<sup>125</sup> Such substances not only inhibit the victim's ability to resist the assault but also the victim's ability to consent.<sup>126</sup>

Regardless of whether the rape victim knew the attacker or not, the experience is traumatic and can be destructive to the victim.<sup>127</sup> The victims' rights movement has worked to protect victims of crimes, especially those sexual in nature, like rape.<sup>128</sup> Such work has produced laws allowing victims, particularly those of statutory rape, to testify outside the view of the defendant and the right to be at the trial and other proceedings if the victim so wishes.<sup>129</sup>

If a child results from the rape of a male, the victim is obligated to pay child support.<sup>130</sup> The trial court in *State v. Daniel G.H.* ignored the jury verdict finding the child's biological father was raped with the help of date rape drugs when the child was conceived, finding that if the court could provide the child with support from two parents, it should because the rape was not the child's fault.<sup>131</sup> In *S.F.*, the biological father, S.F., was intoxicated at the mother's—T.M.'s—party to the point where he got sick and was put to bed, clothed, at her house by T.M. and S.F.'s brother.<sup>132</sup> S.F.'s brother was unable to wake him six hours later when he was leaving, but T.M. offered to allow him to stay, claiming she would look after him.<sup>133</sup> When S.F. woke up the next morning, the bottom half of his body was unclothed and he was still intoxicated.<sup>134</sup> In the months following the party, T.M. bragged to numerous people “that she had had sex with S.F. while he was passed out and that it had ‘saved her a trip to the

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123. See MADDEX, *supra* note 29, at 86 (explaining date rape).

124. See *id.* (noting consequences of rape to both victim and offender).

125. See *id.* (describing drug-facilitated sexual assault).

126. See *id.* (explaining use of drugs and alcohol in rape).

127. See MADDEX, *supra* note 29, at 86 (noting trauma rape causes).

128. See *id.* at 363, 365 (detailing victims' rights movement).

129. See *id.* at 363 (describing laws victims' rights movement has influenced).

130. See *S.F. v. State ex rel. T.M.*, 695 So. 2d 1186, 1189 (Ala. Civ. App. 1996) (“[A]ny wrongful conduct on the part of the mother should not alter the father's duty to provide support for the child.”); *State v. Daniel G.H.*, No. 01-0473, 2002 WL 265006, at \*4 (Wis. Ct. App. Feb. 26, 2002) (upholding jury verdict finding man's rape did not affect determination of child support). *But see S.F.*, 695 So. 2d at 1190, 1192 (Crawley, J., concurring in part and dissenting in part) (stating in rape cases, if welfare will not result, equity requires deviation from support guidelines); *DCSE/Esther M.C. v. Mary L.*, No. 38812, 1994 WL 811732, at \*3 (Del. Fam. Ct. Jan. 3, 1994) (finding *female* incest victim not responsible for support of child conceived by incest).

131. See 2002 WL 265006, at \*2 (“Derek was not at fault and that it would . . . be [un]fair to reduce or remove . . . support.”).

132. See 695 So. 2d at 1187 (describing facts of case).

133. See *id.* at 1187-88.

134. See *id.*



sperm bank.”<sup>135</sup> S.F. entered expert testimony that it was possible for a male to get an erection and ejaculate while unconscious.<sup>136</sup> He contended that he should not be liable for support because he did not voluntarily consent to conception, but the court disagreed, holding that: “The interests of the child are our paramount concern and take precedent over the interest of the other parties involved.”<sup>137</sup>

In similar situations in which a woman is the victim, however, courts and society treat a woman differently than her male counterpart.<sup>138</sup> For example, unlike the situation in *S.F.*, “[t]he sexual assault of an intoxicated, unconscious woman would undoubtedly immediately result in an outcry for justice. Such a woman would face less scrutiny for not wanting to take care of a child that would result from such an assault, if the child were ever born.”<sup>139</sup> Further, courts have found she may not be liable for support of her children.<sup>140</sup> In *DCSE/Esther M.C. v. Mary L.*, a woman refused to pay support for her three minor children.<sup>141</sup> She argued the children were birthed from an incestuous relationship with her brother, and thus, she had not voluntarily consented to their birth and should be relieved of child support obligations.<sup>142</sup> The court found that whether she voluntarily participated in sexual intercourse was a question of fact for the trial court, but “rape or incest may be a defense to payment of child support.”<sup>143</sup> “If the sexual intercourse which results in the birth of a child is involuntary or without actual consent, a *mother* may have ‘just cause’ . . . for failing or refusing to support such a child.”<sup>144</sup>

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135. *S.F. v. State ex rel. T.M.*, 695 So. 2d 1186, 1188 (Ala. Civ. App. 1996) (noting T.M.’s boasting following rape).

136. *See id.* (explaining happenings at trial).

137. *Id.* at 1188-89 (holding S.F.’s claim without merit). S.F. also contended that Alabama law violated his equal protection rights because a woman could not be charged with rape, and thus, he was being punished with no redress. *See id.* at 1190.

138. *See DCSE/Esther M.C. v. Mary L.*, No. 38812, 1994 WL 811732, at \*3 (Del. Fam. Ct. Jan. 3, 1994) (concluding women not liable for support of child when intercourse involuntary); Lewis, *supra* note 30, at 269 (noting more societal sympathy to female rape victims); Morgan, *supra* note 43 (acknowledging unfair treatment of male rape victims).

139. Lewis, *supra* note 30, at 269 (acknowledging differences between treatment of male and female victims of sexual assault).

140. *See DCSE/Esther M.C.*, 1994 WL 811732, at \*3 (allowing *mother* relief from child support for child product of rape or incest).

141. *See id.* at \*1, \*3.

142. *See id.*

143. *Id.* at \*3 (distinguishing actual from legal consent). The court compared the cases in which boys father children through statutory rape to the case in question. *See id.* The court stated that the boys in those cases were assumed to have voluntarily participated in those victimizations but that mothers could be found to not have voluntarily participated in incest or rape. *See id.*

144. *DCSE/Esther M.C. v. Mary L.*, No. 38812, 1994 WL 811732, at \*3 (Del. Fam. Ct. Jan. 3, 1994) (emphasis added) (restricting relief of child support obligations for victims of incest and rape to *mothers*).

### 3. Sperm Stashing

Men can also have their choice to consent to sexual intercourse, and thus procreation, violated through sperm stashing.<sup>145</sup> This occurs when a woman takes a man's sperm without his consent either through saving it from oral sex, from a used condom, or tricking him to produce a sample for medical purposes and self-inseminating herself.<sup>146</sup> For example, in *Phillips v. Irons*, Phillips brought suit against an ex-lover and mother of his child—who he allegedly only had oral sex with, never sexual intercourse—when she sued him for child support and DNA tests confirmed the child was his biological daughter.<sup>147</sup> Phillips further alleged that Irons saved the sperm in her mouth and used her medical expertise to inseminate herself.<sup>148</sup> A similar occurrence transpired in *Frisard* when a nurse at the hospital where the biological father's parents were being treated became unusually concerned with the family.<sup>149</sup> The nurse offered to perform oral sex on him, he agreed, and she insisted he wear a condom.<sup>150</sup> The same day, one of the biological father's clients walked in on the nurse in the hospital room's bathroom with her legs elevated on the toilet seat and her pants down; he quickly closed the door and informed the

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145. See Higdon, *supra* note 1, at 426 (introducing and explaining sperm stashing).

146. See *Anderson v. Russell*, No. N10C-08-177 JRS, 2012 WL 1415911, at \*1 (Del. Super. Ct. Apr. 18, 2012) (describing case where woman told man she needed his sperm for genetic testing); *State v. Frisard*, 694 So. 2d 1032, 1035 (La. Ct. App. 1997) (noting man liable for support when child conceived from self-insemination with sperm from oral sex); Higdon, *supra* note 1, at 429-31 (listing examples of women saving sperm from oral sex and self-inseminating to become pregnant); Georgiale Lang, *Stolen Sperm Results in Twins*, LAWDIVA'S BLOG (Dec. 14, 2011), <http://lawdiva.wordpress.com/2011/12/14/stolen-sperm-results-in-twins>, archived at <http://perma.cc/7LLN-THXH> (describing case where woman took sperm from discarded condom and doctor inseminated her at clinic); Amy S. Rosenberg, *Suit: Ex-wife Secretly Used Sperm Samples To Conceive*, PHILA. INQUIRER, July 4, 1986, at A1, available at [http://articles.philly.com/1986-07-04/news/26098165\\_1\\_sperm-samples-suit-week-in-child-support](http://articles.philly.com/1986-07-04/news/26098165_1_sperm-samples-suit-week-in-child-support), archived at <http://perma.cc/8JEJ-3E72> (detailing woman requesting husband's sperm sample for fertility testing but using it for insemination after divorce). “When a woman [steals sperm], she is denying a man his right to choose . . . . He has responsibilities, but no rights. He becomes a disposable [checkbox].” Amy Cooper, *The Sperm That Got Away*, CAN. CHILD. RTS. COUNCIL (Aug. 18, 2002), [http://www.canadiancrc.com/newspaper\\_articles/Sunday\\_Life\\_Magazine\\_Australia\\_The\\_Sperm\\_That\\_Got\\_Away\\_18AUG02.aspx](http://www.canadiancrc.com/newspaper_articles/Sunday_Life_Magazine_Australia_The_Sperm_That_Got_Away_18AUG02.aspx), archived at <http://perma.cc/U9RS-23L9> (quoting president of male support group in Australia).

147. See No. 1-03-2992, 2005 WL 4694579, at \*1 (Ill. App. Ct. Feb. 22, 2005) (outlining facts of case); *Phillips v. Irons*, No. 05 L 4910, 2006 WL 4472185 (Ill. Cir. Ct. Apr. 18, 2006) (outlining factual background of case).

148. See *Phillips*, 2005 WL 4694579, at \*1-2 (outlining factual background of case). Irons maintained the two did have sexual intercourse while they were together. See *id.* at \*1. There are, however, other cases where sperm is misused without sexual activity between the parties. See *Anderson*, 2012 WL 1415911, at \*1. For example, in *Anderson*, the parties had been dating, and the girlfriend lied to Anderson, telling him she was pregnant, had contracted cystic fibrosis, and needed a sample of his sperm for genetic testing to see if he was a carrier. See *id.* She then had a friend call him to inform him his sample contained blood and he needed to produce another. See *id.* A doctor subsequently inseminated the girlfriend with the sperm sample without Anderson's knowledge. See *id.* at \*2.

149. See 694 So. 2d at 1034 (describing factual background of case).

150. See *id.* at 1035 (explaining relations between biological parents).

biological father.<sup>151</sup> When they returned, the nurse was coming out of the bathroom, and the men saw a glass tube on the ground that they assumed was something related to his mother's medical care.<sup>152</sup> They later believed the glass was used by the nurse to inseminate herself.<sup>153</sup>

In a recent case, Joe Pressil discovered a receipt from a fertility clinic for the cryopreservation of a sperm sample that listed him as the patient, but Pressil had never been there.<sup>154</sup> He later learned from the clinic that his ex-girlfriend, Anetria Burnett, had gone to the clinic with a sperm sample, posing as his wife, and had been inseminated, resulting in the parties' twins.<sup>155</sup> Burnett allegedly acted strange when the two would have sex: she only had sexual intercourse with him in the morning, kept the condoms afterwards, and then would leave, presumably to deposit the samples at the clinic.<sup>156</sup> As a result, Pressil sued the medical providers involved for negligence, conversion, conspiracy, and under theories of respondeat superior as well as the Texas Theft Liability Act.<sup>157</sup> He also sued Burnett for full custody of their resulting twins.<sup>158</sup>

Regardless of the mode of stealing or stashing, at least in the case of oral sex, the man has not consented to sexual intercourse and thus cannot consent to the possible conception of the child, but courts find this irrelevant even if it arises to the level of criminal conduct.<sup>159</sup> Sperm stashing, like rape, has harmful psychological effects, including feelings of insecurity, inability to trust,

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151. See *State v. Frisard*, 694 So. 2d 1032, 1035 (La. Ct. App. 1997).

152. See *id.* (describing facts of case).

153. See *id.* (noting Frisard's realization of self-insemination).

154. See Plaintiff's Original Petition at ¶ 9, *Pressil v. Advanced Fertility Ctr-Tex. & Omni-Med Labs.*, L.L.C., No. 2011 70457 (Tex. Dist. Ct. Nov. 21, 2011) (outlining factual background of case).

155. See *id.* ¶ 11 (describing sperm stashing method carried out by Burnett).

156. See Caron, *supra* note 8 (noting Burnett's activities after sex); Lang, *supra* note 146 (chronicling case of Joe Pressil); *Man Says Ex-Girlfriend Stole His Sperm To Create Kids*, FOX NEWS (Nov. 27, 2011), <http://www.foxnews.com/us/2011/11/27/man-says-ex-girlfriend-stole-his-sperm-to-create-kids/>, archived at <http://perma.cc/6KV2-8W5X> (describing Pressil case). But see Kieran Crowely, *Woman Did Not Stash Sperm To Get Pregnant, Lawyer Claims*, N.Y. POST (Nov. 27, 2011), <http://nypost.com/2011/11/27/woman-did-not-stash-sperm-to-get-pregnant-lawyer-claims/>, archived at <http://perma.cc/5HSJ-K2HF> (recounting Burnett's story, claiming Pressil gave her hormone shots and fully participated in process). Liz Jones, a well-known British newspaper columnist, warned men that, "if a woman disappears to the loo immediately after sex, I suggest you find out exactly what she is up to." Jones, *supra* note 43 (warning men who seek to avoid fatherhood). Jones, a self-proclaimed "sperm snatcher," warns from experience; she attempted to stash the sperm of two former lovers while she maintained to them that she did not want children. See *id.* Jones, like Burnett, would volunteer to dispose of the condoms herself, run to the bathroom, and unsuccessfully attempt to inseminate herself; all attempts failed. See *id.* (confessing sperm stashing attempts while using her age to justify her misconduct).

157. See Plaintiff's Original Petition, *supra* note 154, ¶¶ 13-18 (outlining legal arguments of case).

158. See Caron, *supra* note 8 (claiming Pressil wishes to sue Burnett for sole custody for children due to Burnett's behavior); *Man Says Ex-Girlfriend Stole His Sperm To Create Kids*, *supra* note 156 (stating Pressil will seek full custody of children). But see Crowely, *supra* note 156 (quoting Burnett's attorney as stating Pressil made up story to gain full custody); Lang, *supra* note 146 (noting Burnett's attorney thinks suit scam to avoid paying child support).

159. See Higdon, *supra* note 1, at 429-30 (stating courts find lack of consent irrelevant).

violation of peace of mind, fear of entering into relationships, feelings of being raped, and suicidal thoughts.<sup>160</sup> “Every time [sperm stashing] happens, trust between the sexes is eroded a little bit more, and families are disadvantaged.”<sup>161</sup>

*B. The Unauthorized Use of Sperm: Improper Use of ART*

The fertility industry serves as a multi-billion-dollar-per-year sector that operates with little restrictions, paying men for their sperm and women for their eggs.<sup>162</sup> ART serves as one of the many criticisms for holding men strictly liable for child support obligations when they are raped, statutorily raped, or their sperm is stashed.<sup>163</sup> The major criticism is that sperm and egg donors—people who consent to the conception of their biological children and are in fact paid for it—essentially privately contract away parental obligations with no repercussions, while men who do not consent to conception are held strictly liable.<sup>164</sup>

Further, whether a man is held liable for child support for a child conceived through ART under the supervision of a licensed physician is based upon

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160. See Cooper, *supra* note 146 (explaining growing issue of sperm stashing in Australia). Australia and the United States are not the only countries that are faced with this outlandish and unique societal issue; including the United Arab Emirates (UAE), New Zealand, Germany, and the Czech Republic have also dealt with sperm stashing. See Vittorio Hernandez, *Egyptian Man Accuses Kiwi Wife of Stealing His Sperm To Impregnate Filipina Maid*, INT'L BUS. TIMES (Oct. 4, 2013), <http://au.ibtimes.com/articles/511212/20131004/egyptian-man-accuses-kiwi-wife-stealing-sperm.htm>, archived at <http://perma.cc/S5J2-FPKF> (chronicling UAE case where woman told husband using sperm for testing but inseminated their maid); Brian Whitmore, *Fertile Grounds for a Lawsuit: Czech Man Duped into Giving Sperm*, BOS. GLOBE (Sept. 27, 2003), [http://www.boston.com/news/nation/articles/2003/09/27/fertile\\_grounds\\_for\\_a\\_lawsuit/](http://www.boston.com/news/nation/articles/2003/09/27/fertile_grounds_for_a_lawsuit/), archived at <http://perma.cc/EYY4-CT47> (describing case where Czech man awarded damages for ex-wife's self-insemination without his consent). For example, in a Czech case, a woman told her husband she needed samples of his sperm to obtain better birth control; he complied and she secretly brought the samples to a clinic where she was artificially inseminated, and the insemination resulted in twins. See Whitmore, *supra*. A Czech court found the man's "personal rights were violated" and ordered the clinic to pay the man \$35,000 and his ex-wife pay him \$1,800. See *id.* In addition, the man agreed to acknowledge the children as his own and is paying child support as a result. See *id.*

161. Cooper, *supra* note 146. Women who steal sperm also do a disservice to other women, especially middle-aged women. See *id.* Their predatory nature provides the perception that middle-aged women are desperate for a baby and brings fear to men who want to ensure such women do not violate their procreational rights, leading to apprehension of starting a relationship with middle-aged women. See *id.* (quoting relationship counsellor).

162. See Lewis, *supra* note 30, at 261-62 (discussing fertility industry). Men receive between sixty to seventy-five dollars for a sperm donation, but a man can receive up to one hundred dollars if he has a graduate degree. See *id.* at 262. A woman can receive between \$8,000 to \$100,000 for her eggs depending on her education level. See *id.* at 262-63. Men and women can also receive an increase in their compensation based upon their looks. See KINDREGAN & MCBRIEN, *supra* note 17, at 316-17.

163. See Higdon, *supra* note 1, at 412 (criticizing lack of consent defense in nonART situations); Lewis, *supra* note 30, at 260, 268-69 (criticizing conflict in law regarding lack of liability for male donors in ART).

164. See Lewis, *supra* note 30, at 263 (criticizing conflict in treatment of two classes of biological parents); Belluck, *supra* note 20 (explaining one cannot force parenthood of child conceived through ART, unlike if man has intercourse).

consent.<sup>165</sup> The husband of a woman who is to be artificially inseminated—regardless of whether the sperm belongs to the husband—must consent, usually in writing, to be deemed the child’s legal father and thus liable for support; and sperm donors are relieved of any legal rights and financial responsibility in relation to any resulting children.<sup>166</sup>

This is evident in how courts treat the disposition of frozen pre-embryos in divorce cases.<sup>167</sup> The approaches courts follow in deciding how to determine the disposition of frozen pre-embryos fall under four methodologies.<sup>168</sup> One approach, adopted by a New York court in *Kass v. Kass*, is known as the contractual approach and honors prior agreements by the parties created at the time the genetic material was deposited, and in the absence of such an agreement, the court will destroy the disputed pre-embryos.<sup>169</sup> If there is no agreement between the parties dictating disposition, one approach courts follow favor the spouse seeking to avoid procreation, unless the spouse favoring

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165. See *Levin v. Levin*, 645 N.E.2d 601, 604-05 (Ind. 1994) (holding father liable for support because he consented to insemination orally and in writing); Higdon, *supra* note 1, at 412 (noting importance of consent in ART).

166. See *In re Marriage of Witbeck-Wildhagen*, 667 N.E.2d 122, 125 (Ill. App. Ct. 1996) (holding husband not legal father of child from donated sperm because he did not consent); *R.S. v. R.S.*, 670 P.2d 923, 928 (Kan. Ct. App. 1983) (determining oral consent sufficient to establish parentage for child birthed from heterologous insemination); Higdon, *supra* note 1, at 440-49 (discussing laws of consent and ART). The policies driving the anonymity of sperm donors are so that donors cannot be sued for child support, which encourages donation, and couples or single mothers can be assured no one will seek visitation or custody of their children. See Higdon, *supra* note 1, at 445. It should be noted that sperm donors are only relieved of liability if a licensed physician supervised the donation and insemination. See, e.g., *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 531 (Ct. App. 1986) (holding donor legal father for failure to “take advantage of . . . statutory basis for preclusion of paternity”); *C.M. v. C.C.*, 377 A.2d 821, 824-25 (N.J. Juv. & Dom. Rel. Ct. 1977) (finding known sperm donor legal father because sperm provided to mother who self-inseminated); Morgan, *supra* note 43 (noting support liability for men who do not comply with statute and intend conception).

167. See *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000) (“Enforcing the form against him would require him to become a parent over his present objection”); *Kass v. Kass*, 696 N.E.2d 174, 182 (N.Y. 1998) (honoring prior agreement of parties to donate pre-embryos to research); *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992) (holding spouse objecting to procreation favored unless spouse desiring procreation cannot procreate in another way); KINDREGAN & MCBRIEN, *supra* note 17, at 112-16, 354-56 (outlining approaches states follow in disposition of frozen pre-embryos in divorce cases).

168. See *supra* note 167 (summarizing approaches courts follow).

169. See *Kass*, 696 N.E.2d at 175, 177 (reversing trial court’s decision to disregard agreement); cf. *Roman v. Roman*, 193 S.W.3d 40, 54-55 (Tex. Ct. App. 2006) (refusing to rewrite parties’ voluntary agreement); KINDREGAN & MCBRIEN, *supra* note 17, at 354-55 (summarizing contractual approach regarding disposition of frozen pre-embryos upon divorce). At issue in *Kass* was the disposition of five frozen pre-embryos the parties had created prior to their divorce. See 696 N.E.2d at 175. The parties had agreed to donate any leftover pre-embryos for research purposes if they were to divorce. See *id.* at 175-77. Mr. Kass requested the court to honor this agreement, arguing he should not be burdened by unwanted fatherhood. See *id.* at 175. Mrs. Kass, however, argued that those pre-embryos were her only way to obtain genetic motherhood, and thus, she urged for permission to implant the pre-embryos in herself. See *id.* The *Kass* court criticized the trial court for applying a woman’s right of privacy and bodily integrity to the disposition of pre-embryos, holding the parties’ consent through a prior, mutual agreement was absolute. See *id.* at 179 n.4 (noting such agreements unenforceable if violates public policy).

procreation cannot procreate in another manner.<sup>170</sup> This is also the general approach of states that apply a balancing test of the parties' interests, favoring the party who wishes not to procreate, regardless of whether a contract exists.<sup>171</sup> Massachusetts courts follow a more drastic approach, known as the public policy perspective: regardless of a prior contract establishing how to dispose of leftover pre-embryos, the party who wishes to avoid procreation will prevail.<sup>172</sup> Lastly, some courts, like those in Iowa, follow the contemporaneous mutual consent model and hold that if the parties do not reach a consensus on how to dispose of pre-embryos, the pre-embryos will remain in storage until the

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170. See *Reber v. Reiss*, 42 A.3d 1131, 1132-33, 1142 (Pa. Super. Ct. 2012) (affirming trial court's award of pre-embryos to wife because only way to biological parenthood); *Davis*, 842 S.W.2d at 604 (favoring Mr. Davis's wish to avoid procreation). In *Davis*, for example, the parties divorced, but the only issue in the divorce was the disposition of seven frozen pre-embryos. See *Davis*, 842 S.W.2d at 589. Mrs. Davis wanted to donate the pre-embryos to another couple, but Mr. Davis desired the pre-embryos be destroyed to avoid parenthood and his future children living with separated parents. See *id.* at 590, 604. The court found that Mr. Davis's interest in avoiding parentage outweighed Mrs. Davis's interest in donating the pre-embryos to another couple, reasoning, "[d]onation, if a child came of it, would rob him twice—his procreational autonomy would be defeated and his relationship with his offspring would be prohibited." *Id.* at 604. Further, the court concluded:

[D]isputes involving the disposition of preembryos produced by *in vitro* fertilization should be resolved, first, by looking to the preferences of the progenitors. If their wishes cannot be ascertained, or if there is dispute, then their prior agreement concerning disposition should be carried out. If no prior agreement exists, then the relative interests of the parties in using or not using the preembryos must be weighed. Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered. However, if the party seeking control of the preembryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.

*Id.* In *Reber*, the court also applied a balancing test to the parties' interest; but the court weighed the mother's interest more heavily than the *Davis* court because Reiss underwent chemotherapy and radiation treatments for breast cancer before the pre-embryos were created with her egg and her ex-husband's sperm. See 42 A.3d at 1132-33 (affirming trial court's determination awarding pre-embryos to wife). The court reasoned that the probability that such treatments affected fertility, the difficulty of adopting a child, and her age outweighed Reber's interest in avoiding procreation. See *id.* at 1138-39. Thus, the court ruled "these pre-embryos are likely [the wife's] only opportunity to achieve biological parenthood and her best chance to achieve parenthood at all." *Id.* at 1142.

171. See KINDREGAN & MCBRIEN, *supra* note 17, at 355 (summarizing balancing test approach regarding disposition of frozen pre-embryos upon divorce).

172. See *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1056-57 (Mass. 2000) (holding divorce constituted changed circumstances, and changed circumstances and vagueness precluded enforcement of agreement); KINDREGAN & MCBRIEN, *supra* note 17, at 355 (summarizing public policy approach regarding disposition of frozen pre-embryos upon divorce). "[W]e conclude that, even had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen preembryos, we would not enforce an agreement that would compel one donor to become a parent against his or her will." *A.Z.*, 725 N.E.2d at 1057. The court further concluded that, "as a matter of public policy . . . forced procreation is not an area amenable to judicial enforcement," reasoning "that the law shall not be used as a mechanism for forcing such relationships when they are not desired." *Id.* at 1057-59. The policy for this rule is that "liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship." *Id.* at 1059.

parties agree.<sup>173</sup> Thus, in any approach chosen, the determination of the disposition of pre-embryos is based upon consent, although such consent may be determined at different times and in different manners depending on the jurisdictional approach.<sup>174</sup>

The unauthorized use of sperm in ART situations occurs in the misappropriation of sperm samples or pre-embryos held at a clinic.<sup>175</sup> For example, Layne Hardin's sperm had been misappropriated by an ex-girlfriend, Toby Devall, who forged his signature at the clinic that stored the sperm he had frozen with his ex-wife for possible future use.<sup>176</sup> A child was birthed from this misappropriation, and eighteen months later, Devall sued for child support.<sup>177</sup>

In *Gladu*, Mrs. Gladu used Boston IVF, Inc.'s services for the implantation of pre-embryos created from Mr. Gladu's sperm and a donor's egg that she and Mr. Gladu cryopreserved after becoming pregnant with their son.<sup>178</sup> She did not receive Mr. Gladu's consent to use these pre-embryos, but the original consent form the two signed required Mr. Gladu to inform Boston IVF, Inc. if he wished to withdraw consent at any time.<sup>179</sup> Mr. Gladu was ordered to pay child support for the child conceived without his consent, and he sued Boston IVF, Inc. and the physicians involved for breach of contract and medical malpractice.<sup>180</sup> Although a Massachusetts jury did not find the physicians acted negligently, the jury did award him \$10,000 for emotional distress and \$98,000 for the cost of child support against the clinic for implanting the pre-embryos without his consent.<sup>181</sup> The trial court, reviewing the jury verdict, placed

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173. See *In re Marriage of Witten*, 672 N.W.2d 768, 783 (Iowa 2003) (holding pre-embryos not of use unless parties mutually agree at time of disposition); KINDREGAN & MCBRIEN, *supra* note 17, at 355 (summarizing contemporaneous consent model approach regarding disposition of frozen pre-embryos upon divorce). The court ruled that, in such cases, the party opposing destruction must pay storage fees until the parties can come to a mutual agreement concerning disposition. See *In re Marriage of Witten*, 672 N.W.2d at 783.

174. See *supra* notes 169-72 and accompanying text (summarizing approaches based upon consent).

175. See KINDREGAN & MCBRIEN, *supra* note 17, at 323 (introducing *Gladu v. Boston IVF, Inc.*); Emily Cook & Victoria Ward, *Exclusive: Woman Stole My Sperm To Have IVF Baby, Says Furious Ex*, MIRROR (Sept. 22, 2008), <http://www.mirror.co.uk/news/uk-news/exclusive-woman-stole-my-sperm-to-have-ivf-340024>, archived at <http://perma.cc/SJK3-Z8YH> (detailing case of Layne Hardin).

176. See, e.g., Cook & Ward, *supra* note 175 (detailing case of Hardin); *Layne Hardin, Louisiana Man, Accuses Ex-Girlfriend Toby Devall of Stealing His Sperm*, HUFFINGTON POST (Mar. 2, 2013), [http://www.huffingtonpost.com/2013/03/02/layne-hardin-sperm-toby-devall\\_n\\_2796503.html](http://www.huffingtonpost.com/2013/03/02/layne-hardin-sperm-toby-devall_n_2796503.html), archived at <http://perma.cc/9VJF-VKT8> [hereinafter *Layne Hardin*] (cataloguing story of case under "Weird News"); Tom Porter, *Louisiana Man Accuses Ex-Girlfriend of Stealing His Sperm*, INT'L BUS. TIMES (Mar. 2, 2013), <http://www.ibtimes.co.uk/stealing-sperm-ex-layne-hardin-toby-devall-441376>, archived at <http://perma.cc/E65Z-WFJL> (describing alleged misappropriation of Hardin's sperm).

177. See, e.g., Cook & Ward, *supra* note 175; *Layne Hardin*, *supra* note 176 (describing Hardin case); Porter, *supra* note 176 (quoting Hardin's attorney as stating more precautions regulate sale of cigarettes).

178. See *Gladu vs. Boston IVF, Inc., et al.*, *supra* note 17, at 5:28; see also KINDREGAN & MCBRIEN, *supra* note 17, at 323 (introducing *Gladu*).

179. See *Gladu vs. Boston IVF, Inc., et al.*, *supra* note 17, at 5:28 (detailing nature of consent form).

180. See *id.*

181. See *id.* Mr. Gladu argued he suffered from depression and emotional distress because of the birth of

weight on the alleged fact that Mr. Gladu told Mrs. Gladu at the time of their divorce that he did not want more children.<sup>182</sup> The court found less persuasive the clinic's argument that Mr. Gladu had an obligation to inform the clinic if he did not wish to have additional children or if his marital status had changed.<sup>183</sup>

Critics find this unequal treatment undermines the courts' justification for strict liability in nonART situations that a child deserves the support of two parents.<sup>184</sup> The difference in treatment between the two spheres of reproduction hinges upon a woman's bodily integrity, when she is pregnant, bodily intrusion is necessary to prevent the pregnancy from coming to term, but when parents are fighting over pre-embryos, the woman's body is not a factor.<sup>185</sup> In these situations, the procreational rights of men and women are equal, and courts tend to favor the parent who desires not to procreate.<sup>186</sup> Scholars who advocate for equal procreational rights for men and women find progress in cases involving the disposition of frozen pre-embryos because "courts have already begun distinguishing the right to decide not to be a [legal]

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an unwanted child. *See id.* Germany and the UAE have also addressed this issue. *See Doctors Must Pay For 'Stolen Sperm' Babies*, LOCAL (Apr. 20, 2012), <http://www.thelocal.de/20120420/42059>, archived at <http://perma.cc/CGT7-EVF8> [hereinafter *Doctors Must Pay*] (describing case where two German gynecologists artificially inseminated woman without biological father's consent); Haneen Dajani, 'Ex-wife Stole My Frozen Sperm', *Man Tells UAE Court*, NAT'L (Sept. 24, 2012), <http://www.thenational.ae/news/uae-news/courts/ex-wife-stole-my-frozen-sperm-man-tells-uae-court>, archived at <http://perma.cc/5KPF-KBLU> (describing case where UAE man's frozen sperm stolen by ex-wife). A German court ordered two gynecologists to pay child support for twins that were birthed from artificial insemination conducted by them because they had not destroyed the biological father's sperm as the parties had agreed. *See Doctors Must Pay, supra*. The court declared, "We are satisfied that the complainant did not agree to the use of his sperm for an artificial insemination." *Id.* British courts take a different approach. *See Tara J. Palmatier, True Story: Woman Steals Ex-Husband's Sperm and Collects Almost \$200,000 in Back Child Support*, SHRINK 4 MEN (June 3, 2011), <http://www.shrink4men.com/2011/06/03/true-story-woman-steals-ex-husbands-sperm-and-collects-almost20000-in-back-child-support/>, archived at <http://perma.cc/QBR5-U663>. A British court ordered a man to pay 200,000 pounds in back child support for children who were birthed from his frozen sperm, which his ex-wife stole through forging his signature at a fertility clinic. *See id.*

182. *See Gladu v. Boston IVF, Inc., et al., supra* note 17, at 5:28 (analogizing to Massachusetts's public policy precluding forced procreation).

183. *See id.*

184. *See Higdon, supra* note 1, at 412 (arguing ART parentage based on consent should apply to nonART situations); Bruno, *supra* note 41, at 153-54 (noting in ART situations right to parent and not to parent deadlock).

185. *See Kass v. Kass*, 696 N.E.2d 174, 179 (N.Y. 1998) (criticizing trial court for considering reproductive choice jurisprudence in deciding disposition of frozen pre-embryos); Gross, *supra* note 31, at 1041 (acknowledging women and men in ART situations differently situated than men and women currently expecting); Belluck, *supra* note 20 (emphasizing importance of lack of bodily integrity concern in ART situations). The "embryo is in the woman's body, it's within her and can't be separated from her, so it's not just her decision-making about whether to bear a child, it's about her body," but with the use of ART, "nothing . . . involves her physical integrity." Belluck, *supra* note 20. "As science and technology progress, the legal landscape of men's rights in these regards will undoubtedly face interesting new changes." Gross, *supra* note 31, at 1041.

186. *See Bruno, supra* note 41, at 153-54 (noting parents have equal procreative rights); Gross, *supra* note 31, at 1039-40 (presenting case of *Davis*).



parent from the right not to be a biological parent.”<sup>187</sup>

### III. ANALYSIS

#### *A. An Inequitable Disconnection Exists Between Constitutionally Granted Rights and Judicial Practice.*

The Supreme Court has bestowed a constitutional protection on the decision of whether and when to have children for both men and women, but in practice, only women truly possess this right.<sup>188</sup> This is evidenced by the strict liability standard placed upon child support obligations in situations where sperm is used to impregnate a woman without authorization, but not when a female is victimized in a similar fashion.<sup>189</sup> Such blatant inequality is cloaked in the best interest of the child policy, but in reality, the actual policy driving the strict liability standard is the fiscal wellbeing of the government.<sup>190</sup> Male payment for their own victimization, particularly in cases of rape and statutory rape, is inappropriate as all states have statutes that place the financial burdens of a crime victim’s harm on the government.<sup>191</sup>

Unfairness and inequality surrounding the treatment of males in these situations not only affects how males are treated in the areas of procreation rights and rape but also how women are treated.<sup>192</sup> Allowing females to use rape as a defense to support obligations of their biological children but not

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187. Bruno, *supra* note 41, at 154 (hoping ART case law will lead to more equal procreational rights in nonART cases); *see also* Melanie B. Jacobs, *Intentional Parenthood’s Influence: Rethinking Procreative Autonomy and Federal Paternity Establishment Policy*, 20 AM. U. J. GENDER SOC. POL’Y & L. 489, 507 (2012) (“As the use of ART increases, so, too, will the application of intentional parenthood.”).

188. *Compare* Carey v. Population Servs. Int’l, 431 U.S. 678, 693 (1977) (extending procreative choice to minors), Roe v. Wade, 410 U.S. 113, 153-54 (1973) (finding women’s freedom to choose to procure abortion within constitutional right to privacy), Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (extending freedom to choose contraceptives to single people), *and* Griswold v. Connecticut, 381 U.S. 479, 487-86 (1965) (establishing right to privacy as including right to bear or beget children), *with* MADDEX, *supra* note 29, at 79-82 (outlining constitutional right to procreative choice jurisprudence), *and* Bruno, *supra* note 41, 164 n.149 (“[R]ecognizing the importance of the analytical dissonance between the recognition of a right to decide not to be a [parent] and the application of such right.”).

189. *Compare* S.F. v. State *ex rel.* T.M., 695 So. 2d 1186, 1189 (Ala. Civ. App. 1996) (holding rape victim liable for child support), Cnty. of San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d 843, 843 (Ct. App. 1996) (finding statutory rape victim liable for support), *and* State v. Frisard, 694 So. 2d 1032, 1034-36 (La. Ct. App. 1997) (finding sperm stashing victim liable for child support), *with* DCSE/Esther M.C. v. Mary L., No. 38812, 1994 WL 811732, at \*3 (Del. Fam. Ct. Jan. 3, 1994) (comparing incest to statutory rape and acknowledging such as excuse to support children for females), *and* Higdon, *supra* note 1, at 438 (arguing strict liability unequal because female victims have choice to abort or put up for adoption).

190. *See* MADDEX, *supra* note 29, at 66 (noting interest of government in child support collection); Higdon, *supra* note 1, at 416, 432-39 (arguing judicial economy and reimbursement of welfare benefits real rationales for strict liability standard); Lewis, *supra* note 30, at 271-79 (noting government one who benefits).

191. *See* Higdon, *supra* note 1, at 433-34 (describing justification of statutes as moral obligation of government and shared risk of citizens).

192. *Cf.* COCCA, *supra* note 100, at 18-19, 92 (describing sentiment in feminist movement of gender neutral rape laws to sexually empower women).

males, for example, enforces archaic stereotypes of men and women, benefiting neither gender.<sup>193</sup> Men are traditionally perceived as aggressive predators who cannot be victims because they—by nature—desire sexual interactions, while women are traditionally seen as helpless, passive participants in sexual activity who must be protected.<sup>194</sup> Although liberal feminists found that these cultural beliefs deny rights to females that their male counterparts are entitled to, these beliefs—implicitly engrained in judicial decision making—also send the message that either men are stronger than women and can better deal with the harms associated with victimization, or that male victimization is neither as important as their female counterparts' victimization nor the preservation of welfare funds of the government.<sup>195</sup>

As with all stereotypes, these outdated characterizations are inaccurate; women can be predators just as males can be victims.<sup>196</sup> Liz Jones and the women she discusses serve as examples of predatory women who believe stealing sperm is their right.<sup>197</sup> Further, simply because males and females are

193. *See id.* (noting gender stereotypes regarding sex).

194. *See id.* (recognizing archaic gender labels of males as aggressors and females as victims). In lobbying for gender neutral laws for statutory rape, liberal feminists argued:

If sex is viewed as a privilege, for a state to say that a girl of a certain age is neither legally nor factually capable of consenting to that act while boys are able to consent to sex at any age with any wom[a]n, that girl has been deprived of a right that her male counterpart has been allowed to engage in.

*Id.* at 18-19 (quotation marks omitted).

195. *Cf. id.* (recognizing views towards male victims in statutory rape cases); MADDEX, *supra* note 29, at 66 (stating government's interest in collecting child support); Higdon, *supra* note 1, at 416, 432-39 (suggesting real rationales for strict liability standard other than best interest of child); Lewis, *supra* note 30, at 271-79 (noting government benefits from unequal policy).

196. *See S.F. v. State ex rel. T.M.*, 695 So. 2d 1186, 1187-88 (Ala. Civ. App. 1996) (describing case where rapist boasted to friends her conduct saved her trip to sperm bank); *Cnty. of San Luis Obispo v. Nathaniel J.*, 57 Cal. Rptr. 2d 843, 843-44 (Ct. App. 1996) (describing case of male victim of statutory rape by woman nineteen years older); *Phillips v. Irons*, No. 1-03-2992, 2005 WL 4694579, at \*4-5 (Ill. App. Ct. Feb. 22, 2005) (finding sperm stashing could lead to possible intentional infliction of emotional distress (IIED) claim); *State ex rel. Hermesmann v. Seyer*, 847 P.2d 1273, 1274-75 (Kan. 1993) (describing case where boy taken advantage of by babysitter); *State v. Frisard*, 694 So. 2d 1032, 1034 (La. Ct. App. 1997) (describing case where nurse sperm stashed and self-inseminated from ill patients' son); *State v. Daniel G.H.*, No. 01-0473, 2002 WL 265006, at \*2 (Wis. Ct. App. Feb. 26, 2002) (describing case of jury verdict finding father raped by child's mother); *J.J.G. v. L.H.*, 441 N.W.2d 273, 276 (Wis. Ct. App. 1989) (noting male victim hospitalized for psychiatric problems and unable to hold job due to victimization); COCCA, *supra* note 100, at 18-19, 92 (noting males as class of victims); MADDEX, *supra* note 29, at 271 (recognizing males as victims); Higdon, *supra* note 1, at 435 (listing harms experienced by men associated with victimization); Lewis, *supra* note 30, at 270-71 (labeling liability of statutory rape victim as further victimization); Bruno, *supra* note 41, at 161-62 (noting father victims suffer emotional and psychological harms); Cooper, *supra* note 146 (explaining victims of sperm stashing feel raped); Jones, *supra* note 43 (recounting personal attempts at sperm stashing).

197. *See Jones*, *supra* note 43 (insinuating sperm stashing fault of trusting men and not their devious female partners). In her article discussing her own multiple attempts at sperm stashing with two different men, Jones's words serve as evidence that women can be predators. *See id.* Even though she told these men she did not want children, she stated in regards to her first attempt that she "resolved to steal his sperm from him in the

differently situated in the process and effects of sexual activity does not mean that male victimization should be ignored because they, too, suffer and such pain negatively affects their lives as well; victimization is victimization, regardless of gender.<sup>198</sup> Particularly in statutory rape cases, boys should not be shamed and accused of misconduct when they are taken advantage of by older women, often in positions of authority.<sup>199</sup>

*B. Statutory Rape Victims, Due to Their Age, Are at an Even Greater Disadvantage Than Other Victims of the Unauthorized Use of Sperm.*

Statutory rape victims—unlike victims of sperm stashing and some nonstatutory rape victims—are children when their victimization forces them into parenthood.<sup>200</sup> These boys are forced to be fathers, students, and minimum-wage workers to pay child support for “a child not much younger than” them, and sometimes, the court may shift the burden of support onto their parents.<sup>201</sup> Thus, these boys not only face the psychological and emotional harms of being victims of statutory rape, but their ability to move on with their lives is substantially hindered as well.<sup>202</sup> The possibility for these boys to

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middle of the night. [She] thought it was [her] right, given that he was living with [her] and [she] had bought him many, many . . . meals.” *Id.* Jones justifies her actions by characterizing sperm stashing as her right as a middle-aged woman, and she further argues that men who are in relationships with a woman in their thirties or forties should know that “she will want to use them to procreate.” *Id.* Such ideologies that lead one to believe that she could possibly have a right to someone else’s body and simply that men are things to be *used* by middle-aged women for procreation proves—among other things—that woman can be—and sometimes are—predators. *See id.*; *see also S.F.*, 695 So. 2d. at 1187-88 (stating child’s mother bragged to friends raping child’s father saved her trip to sperm bank).

198. *See Phillips*, 2005 WL 4694579, at \*4-5 (finding woman’s behavior of sperm stashing could lead to possible IIED claim); *J.J.G.*, 441 N.W.2d at 276 (noting male victim hospitalized for psychiatric problems and unable to hold job due to victimization); Higdon, *supra* note 1, at 435 (listing harms experienced by men associated with victimization); Lewis, *supra* note 30, at 270-71 (labeling liability of statutory rape victim as further victimization); Bruno, *supra* note 41, at 161-62 (noting father victims suffer emotional and psychological harms); Cooper, *supra* note 146 (explaining victims of sperm stashing feel raped).

199. *See Nathaniel J.*, 57 Cal. Rptr. 2d at 843-44 (describing statutory rape case involving male victim nineteen years younger than female rapist); *State ex rel. Hermesmann*, 847 P.2d at 1247-75 (describing case where defendant father statutorily raped by his babysitter since age twelve); Mercer Cnty. Dep’t of Soc. Servs. v. Alf M., 589 N.Y.S.2d 288, 289 (Fam. Ct. 1992) (refusing to “give credit” to sixteen-year-old boy’s allegations of rape by child’s mother); *J.J.G.*, 441 N.W.2d at 275 (rejecting statutory rape victim’s claim he did not legally or factually consent). In all of these cases, the male minors were deemed at fault and not innocent parties in their victimization. *See Nathaniel J.*, 57 Cal. Rptr. 2d at 844 (labeling statutory rape victim as not innocent); *State ex rel. Hermesmann*, 847 P.2d. at 1279 (referring to statutory rape victim as not “truly innocent”); *J.J.G.*, 441 N.W.2d. at 275-76 (labeling statutory rape victim as willing and voluntary participant).

200. *See Lewis*, *supra* note 30, at 277-78 (acknowledging unfavorable situation strict liability creates for male statutory rape victims).

201. *See id.* at 277 (discussing possible ways male statutory rape victims financially responsible for children). If the boy litigates enough, he may be able to delay the start of his obligation until he reaches the age of majority. *See Nathaniel J.*, 57 Cal. Rptr. 2d at 843-44 (deferring child support obligation until boy reached age of majority); *see also Lewis*, *supra* note 30, at 276-77 (noting boy only obtained grace period through litigation).

202. *See Lewis*, *supra* note 30, at 277-78 (recognizing emotional difficulties faced by male statutory rape

better themselves through education and a higher paying job is severely impeded by the lack of choice to attend college and the inability to solely focus on high school because they must get jobs to fulfill the legal obligations imposed on them for being taken advantage of as children.<sup>203</sup> Essentially, both the rapists and the government—the supposed protector of crime victims—are exploiting these boys, and the government is conducting such exploitation in the name of frugality.<sup>204</sup> Thus, “[i]f the purpose of statutory rape laws is to protect children from being exploited by adults, then there is a serious flaw in the application of these laws.”<sup>205</sup>

### C. Proposal for a Practical, Equitable Solution

Both courts and legislatures have the ability to correct the unfairness and inequality in the current law regarding the unauthorized use of sperm.<sup>206</sup> Courts must enforce the constitutional protection of procreational choice that men are entitled to, and legislatures can help ensure such protection through the enactment of statutes that uphold these constitutional ideals.<sup>207</sup> Contrary to the fears of the courts, the best interest of the child and the constitutional protections of male reproductive rights can both be preserved by treating males and females—both victims and perpetrators—equally and borrowing from the consent-based jurisprudence of parental obligations in ART situations.<sup>208</sup>

#### I. Solution for Statutory Rape Victims

Of the three classes of victims of the unauthorized use of sperm, victims of statutory rape are in the best position to prove their victimization because of the

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victims).

203. See *id.* (noting those with high school degrees earn substantially less than those with college degrees). “It is . . . commonly known that young parents often feel compelled to take care of their children instead of pursuing higher education. Therefore, [these boys’] future earning capacity[ies] may be impacted by [their] present child support obligations.” *Id.* at 277.

204. See *id.* at 276-78 (criticizing collection of child support from statutory rape victims). “The state should not seek reimbursement from someone that its laws were supposed to protect.” *Id.* at 276.

205. *Id.* at 278 (criticizing application of strict liability of child support obligations to male statutory rape victims).

206. See Higdon, *supra* note 1, at 438, 449-57 (arguing unequal treatment violates men’s constitutional right to reproductive autonomy and proposing statutory reform); Lewis, *supra* note 30, at 271-79 (arguing states should compensate victims like sperm donors and allow renunciation of parental obligations); Bruno, *supra* note 41, at 160-73, 164 n.149 (responding to lack of enforcement of male constitutional rights by proposing statutory defense to obligations); Gross, *supra* note 31, at 1016 (acknowledging society and law ignore male procreational rights).

207. See *infra* note 208 (discussing scholars’ proposals for statutory action and lack of enforcement of constitutional rights by courts).

208. See Higdon, *supra* note 1, at 438, 449-57 (suggesting statutes adopting consent-based approach found in ART cases); Lewis, *supra* note 30, at 260, 271-79 (arguing equal benefits for victims as sperm donors); Bruno, *supra* note 41, at 160-73 (proposing statutory defense to child support obligations taking consent into account).

nature of the crime.<sup>209</sup> Proof of the act of sex alone with an underage child is proof of guilt of sexual assault, and a biological child of the underage victim and the perpetrator—the same evidence the women in these cases would use to create liability for child support—surely establishes such proof.<sup>210</sup> Once it is proven that the defendant fathered the child while under the age of consent, the law should treat both the female rapist and male victim as their male and female counterparts.<sup>211</sup> The female's criminal conduct should initiate dissolution of her parental rights to the child, just as is the case with male rapists.<sup>212</sup> Upon such dissolution, the male victim should be situated with similar rights as his female peers; he should gain sole parental rights to the child and be able to make the same decision his female counterpart does about whether to place the child up for adoption or take on parental responsibilities.<sup>213</sup>

This solution provides seven benefits to the current nature of statutory rape jurisprudence.<sup>214</sup> It provides male statutory rape victims the constitutionally protected right to procreational autonomy that the current application of the doctrine has stripped from them.<sup>215</sup> This solution also ensures that the best interest of the two children involved is preserved, empowering the statutory rape victim to decide what will become of his victimization.<sup>216</sup> Further, it is not in the best interest of the child birthed from the victimization to be in the custody of a rapist.<sup>217</sup> Next, men and women will be treated equally, allowing the law to rid itself of the inaccurate and archaic gender stereotypes in regards to sex.<sup>218</sup> Additionally, female bodily integrity is preserved as it does not

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209. See MADDEX, *supra* note 29, at 275 (explaining statutory rape offenses hold offenders to strict liability standard as to age of victim).

210. See *id.* (discussing elements and proof necessary for statutory rape defense).

211. See Higdon, *supra* note 1, at 424, 438 (describing lack of male reproductive choice compared to females); Lewis, *supra* note 30, at 269-70 (arguing cultural stereotypes reduce sympathy for male victims and lead to procedures contradictory to statutory rape policies); Morgan, *supra* note 43 (recognizing men and women treated differently in rape cases).

212. Cf. Lewis, *supra* note 30, at 273-74 (arguing female rapists should be held to similar level of accountability as male rapists); Bruno, *supra* note 41, at 151 (“[C]ourts deny rapists the status of legal fatherhood, despite biological parentage.”).

213. See Higdon, *supra* note 1, at 438 (arguing such obligations and unequal treatment violates men's constitutional right to reproductive autonomy).

214. See *infra* notes 216-23 and accompanying text (explaining potential benefits).

215. See *supra* note 170 and accompanying text (discussing procreational rights jurisprudence and lack of enforcement in relation to males).

216. See Higdon, *supra* note 1, at 439 (noting child birthed from victimization not only child in need of protection); Lewis, *supra* note 30, at 277-78 (arguing strict liability standard not protecting male victims of statutory rape). “[C]ourts must continue their attempts at protecting the child's best interest, but at the same time, they also must not further punish victims of sexual assault.” Higdon, *supra* note 1, at 439.

217. Cf. Bruno, *supra* note 41, at 151-52 (noting courts prohibit male rapists from having contact with child birthed from victimization).

218. See COCCA, *supra* note 100, at 18-19, 92 (describing sentiment in feminist movement equal treatment leads to erosion of negative gender stereotypes).

infringe on a woman's choice to select abortion.<sup>219</sup> This solution also honors consent, like the jurisprudence regarding situations of ART.<sup>220</sup> Further, it fulfills the government's promise to protect crime victims, specifically children from adult predators.<sup>221</sup> Lastly, it will not infringe upon the government's welfare benefits as the child will either be put up for adoption and the adoptive parents will pay for the child or the male victim will accept the financial burden.<sup>222</sup>

## 2. *Solution for Nonstatutory Rape Victims*

The solution for rape victims is very similar to that of the solution for statutory rape victims, but adult rape victims have a harder time establishing proof of the crime.<sup>223</sup> Adult men could not rest solely on proof of biological parenthood; they would have to offer other evidence to prove that sexual intercourse occurred without their consent.<sup>224</sup> Upon such a showing, the same dissolution of parental rights discussed above would result, and the male rape victim will gain his procreational choice to decide to raise the child or put the child up for adoption.<sup>225</sup> This solution carries the same benefits as the solution proposed for statutory rape victims, with the exception of the best interest of the child victim.<sup>226</sup>

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219. See *supra* note 81 and accompanying text (stating women's right to abortion paramount due to physical differences of men and women).

220. See *supra* Part II.D (discussing role of consent in ART situations).

221. See Higdon, *supra* note 1, at 433-34 (describing statutes requiring government to pay for victim's financial burdens due to victimization); Lewis, *supra* note 30, at 277-78 (criticizing government's failure to protect male statutory rape victims by imposing child support obligations).

222. Compare MADDEX, *supra* note 29, at 66 (describing real interest as government collecting child support), Higdon, *supra* note 1, 416, 432-39 (contending judicial economy and reimbursement of welfare benefits real reasons for holding victim liable), and Lewis, *supra* note 30, at 271-79 (noting government, not child, as one who benefits from support suits), with COCCA, *supra* note 100, at 173 n.38 (summarizing criminal statistics of female statutory rapists).

223. See Higdon, *supra* note 1, at 453-54 (noting ease of proving statutory rape cases when child results).

224. See *id.* at 454 (noting difficulties adult men may face in proving lack of consent). For example, in *S.F.*, S.F. was able to corroborate his allegations of rape through eye witness testimony of his state of being the night of conception, witnesses who testified the rapist boasted to them about what she had done, and expert testimony confirming men's ability to ejaculate while unconscious. See *S.F. v. State ex rel. T.M.*, 695 So. 2d 1186, 1188 (Ala. Civ. App. 1996) (noting several witnesses testified rapist bragged about having sex with unconscious S.F.). Surely, a confession of rape would be the best evidence a male adult could provide the court. See *State v. Daniel G.H.*, No. 01-0473, 2002 WL 265006, at \*1 (Wis. Ct. App. Feb. 26, 2002) (noting jury found child's mother raped child's father with help of drugs).

225. See *supra* notes 209-11 and accompanying text (introducing proposed solution, including dissolution of rapists' rights and empowerment of victim).

226. See *supra* Part II.D (discussing role of consent in ART situations); *supra* note 81 and accompanying text (stating women's right to abortion paramount due to physical differences of men and women); *supra* note 170 and accompanying text (discussing procreational rights jurisprudence and lack of enforcement in relation to males); *supra* Part III.C.1 (outlining benefits of proposed solution aligned with established legal policies).

### 3. *Solution for Sperm Stashing Victims*

The solution for victims of sperm stashing is different from that of victims of statutory and nonstatutory rape because sperm stashing is not illegal or even a recognized cause of action.<sup>227</sup> Regardless of legality, some of these men did not participate in sexual intercourse, and thus, they did not consent to the risk of conception.<sup>228</sup> The proper solution for these victims would be for courts to restore their constitutional procreational rights by adopting a consent-based approach, well-established in ART cases.<sup>229</sup> At the very least, courts should consider the wrongdoing of the mother for equitable reasons in determining support; courts should weigh more heavily the mother's income to be dedicated to the child's best interest due to her wrongdoing and thus allow for a decrease in the percentage the father owes.<sup>230</sup>

## IV. CONCLUSION

The current state of the law regarding the unauthorized use of sperm creates a caste system between those whose victimization is created by ART and those whose is not; strips men of their procreational rights; and forces the victims to pay for their victimization while being constantly reminded of it in the form of child support. None of this is done in the name of some higher purpose like the best interest of the child; it is all done to preserve government funds and create a bright line rule for judicial economy. A more equitable solution grounded in consent would cure these shortcomings, empower victims of both genders, and

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227. See *Anderson v. Rusell*, No. N10C-08-177 JRS, 2012 WL 1415911, at \*11 (Del. Super. Ct. Apr. 18, 2012) (holding man liable for support when woman used sperm for medical research for insemination); *State v. Frisard*, 694 So. 2d 1032, 1035-36 (La. Ct. App. 1997) (refusing to acknowledge sperm stashing as defense to support obligations).

228. See Higdon, *supra* note 1, at 449-50 (declaring solution to unauthorized use of sperm situations by applying ART consent-based principles); cf. Lewis, *supra* note 30, 271-79 (outlining proposed statutes treating victims of unauthorized use of sperm as sperm donors). Along with rape and statutory rape, Lewis's article addresses contraceptive fraud, in which men consent to sexual intercourse but not conception—this is not the focus of this Note and this Note does not necessarily agree that fathers in these situations should be relieved of any responsibility—but this author believes her analysis would also be applicable to victims of sperm stashing in situations where men did not consent to sexual intercourse. See *id.*

229. See Higdon, *supra* note 1, at 450-51 (outlining his rule for more equitable standard of child support determination); cf. Lewis, *supra* note 30, at 271-79 (outlining proposed statutes treating victims of unauthorized use of sperm as sperm donors). Higdon's proposed solution states:

[W]hen . . . the biological father did not consent to the act that resulted in the mother's pregnancy: A man is not the natural father of a child, bears no liability for the support of the child, and has no parental rights to the child if he can show, by clear and convincing evidence, that he did not consent to the act of sexual intercourse (or, in the case of home insemination, to the act of self-insemination) that resulted in the conception of the child.

Higdon, *supra* note 1, at 450-51 (internal quotation marks omitted).

230. See Lewis, *supra* note 30, at 274-75 (stating best interest of child best apportioned from extra income contribution of wrongdoer).

ensure the best interests of the children birthed and victimized are championed. When the law decides to recognize that males can be victims and females can be predators, there will be true equality between the sexes and fulfillment of the constitutional ideals upheld by the Supreme Court. Until then, male victims will be told their victimization is not as important as female victimization or government funds.

*Nicole A. Faille*